SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE AND WALLACE D. BRADFORD, APPELLANTS,

vs.

EARL L. CLARK, DRAIN COMMISSIONER OF OAKLAND COUNTY, MICHIGAN, AND BOARD OF SUPERVISORS OF OAKLAND COUNTY, CITY OF ROYAL OAK, INTERVENOR

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

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IN THE CIRCUIT COURT OF OAKLAND COUNTY, MICHIGAN

KENNETH M. KEEFE and WALLACE D. BRADFORD, Petitioners and Appellants,

vs.

EARL L. CLARK, Drain Commissioner of Oakland County, and Board of Supervisors of Oakland County

STATEMENT OF REASONS AND GROUNDS FOR APPEAL—Filed April 9, 1943

Petitioners herein say that the judgment heretofore entered dismissing the petition is erroneous in the following respects:

1. The court erred in holding that respondents are not obliged by Section 18, Chapter X, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927 and Act 129 Michigan Public Acts 1939, to levy and spread, in accordance with the percentages in the original assessment roll of East Clawson Storm Sewer Drain against the governmental subdivision taxed at large therefor and against all lands in the district not owned by the United States, State of Michigan, or municipalities, and used by them for governmental purposes, an additional deficiency assessment sufficient when collected to pay all outstanding bonds of said district and interest thereon, whereas the court should have held that respondents are obliged to levy and spread such additional deficiency assessment.

2. The court erred in holding that if refunding bonds and certificates of indebtedness are issued by East Clawson Storm Sewer Drain District, the Drain Commissioner will not be empowered under Act 129 Michigan Public Acts 1939 to provide, subject to the directions of the Public Debt Commission, for additional levies of assessments prior to the maturity of such refunding bonds and certificates of indebtedness as he shall deem necessary to prevent default in payment of interest on such obligations and the maintenance of a sinking fund for their retirement, whereas the

[fol. 3] court should have held that the Commissioner will be so empowered.

3. The court erred in holding that the provisions contained in paragraph 11 of the order of the Drain Commissioner dated April 9, 1942, copy of which is attached to the petition, may not lawfully be performed, whereas he should have held that such provisions may lawfully be performed.

4. The court erred in holding that lands in the East Clawson Storm Sewer Drain District which have been transferred to private owners by the State of Michigan by deed or contract made pursuant to Act 155 Michigan Public Acts 1937 are exempt from an additional deficiency assessment to meet requirements of bonds issued by said district, whereas he should have held that such lands are not so exempt.

5. That the court erred in denying the petition.

Voorhies, Long, Ryan & McNair, Dykema, Jones & Wheat, Attorneys for Petitioners and Appellants.

IN CIRCUIT COURT OF OAKLAND COUNTY

PETITION FOR DECLARATORY JUDGMENT—Filed June 25, 1942

Kenneth M. Keefe and Wallace D. Bradford, petitioners herein, file this petition pursuant to Sections 13903 to 13909 Michigan Compiled Laws of 1929, against Earl L. Clark, Drain Commissioner of Oakland County, and Board of Supervisors of Oakland County, respondents herein, for a binding declaration of rights in the matters hereinafter set [fol. 4] forth, and respectfully show unto the Court as follows:

1. That they are the owners of thirty-two (32) bonds issued by East Clawson Storm Sewer Drain District, a drain district in Oakland County, Michigan. A copy of one of said bonds is attached hereto and marked Exhibit 1. All other bonds issued by said drain district are in the same form and tenor, except for variance of maturity dates and serial numbers. All bonds held by petitioners are in default as to principal and in default as to interest since May

1, 1939. The bonds held by petitioners bear serial numbers and maturity dates as follows:

Serial Numbers	*Maturity Dates*
71 to 80, both inclusive, and 85	May 1, 1932
121 to 130, both inclusive	May 1, 1933
137	May 1, 1935
191 to 195, both inclusive, and 211 to 215, both inclusive	May 1, 1936

2. Petitioners and holders of other bonds issued by the said drain district have long endeavored to obtain payment of their bonds, or the issuance of refunding obligations in lieu thereof, and have for several years been negotiating with respondent Drain Commissioner, his predecessors in office, and Matthew Carey, Refunding Agent, in relation to a refunding, and recently have received a communication from said Matthew Carey, a copy of which is hereto attached and marked Exhibit 2. Petitioners are informed and believe that similar communications have been sent to other holders of said bonds, and that such holders, or a substantial number thereof, have either deposited their bonds in escrow as requested in said communication or are about to [fol. 5] do so. Petitioners have deposited their bonds in escrow, and thus expressed their willingness to settle interest claims as proposed, and to accept refunding bonds.

3. Petitioners are informed and believe that the matters recited on pages 1 and 2 of the Drain Commissioner's order dated April 9, 1942, and in the three tabulations made parts of said communication, entitled "Analysis of 1937, 1938, 1939 and 1940 Spreads and Current Collections East Clawson Storm Sewer Drain District," "Exhibit E-1 (Revised) Analysis of Collections by Years, Exhibit E-2, Summary of Receipts and Disbursements to December 31, 1941," and "Exhibit G—East Clawson Storm Sewer Drain District, Oakland County, Michigan—Analysis of Special Assessment Roll by Subdivision," all of which appear in the said communication, Exhibit 2; are substantially correct. Petitioners have requested respondent Drain Commissioner to proceed to issue refunding bonds, but he refuses so to do, and petitioner is advised that in this respondent Board of Supervisors supports him, because it is his opinion that so many parcels of land in the drain district have become exempt from the levy of additional or deficiency drain assess-

ments that sufficient moneys could not be obtained from the district to service the said refunding bonds. Petitioners, however, insist that holders of the existing bonds are entitled by Section 18, Ch. X, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927 and Act 129 Michigan Public Acts 1939, to an additional deficiency levy or levies of amounts sufficient to pay the debt of said drain district, against the political subdivisions taxed at large and against all lands in the district included in the original assessment rolls, except such as are now owned by the State of Michigan, United States of America, [fol. 6] or municipal corporations, and used by them for governmental purposes. With taxes available from such sources, petitioners are advised and believe that the proposed refunding bonds and certificates of indebtedness can be adequately serviced and paid.

4. An actual controversy therefore, exists between petitioners and other bondholders on the one hand, and respondents on the other, upon the following questions:

(a) Are respondents obliged to levy an additional deficiency assessment pursuant to Section 18, Ch. X, Act 316 Michigan Public Acts of 1923, as amended by Act 331 Michigan Public Acts 1927 and Act 129 Michigan Public Acts 1939, to pay the outstanding bonds and interest accrued thereon against the political subdivisions taxed at large, and against all lands in the district included in the original assessment roll, except such as are owned by the State of Michigan, United States of America, or municipal corporations, and used by them for governmental purposes?

(b) If refunding bonds are issued as contemplated in the Commissioner's order, can additional deficiency assessments be made periodically as contemplated in paragraph 11 of the Commissioner's order against the said municipalities and against those lands in the district which at the time of the making of such additional deficiency assessments are not owned by the State of Michigan, United States of America, or municipal corporations, and used by them for governmental purposes?

(c) When title to a parcel of land in the district against which an assessment for the drain was orig-

[fol. 7] inally levied passes to the State under a sale for delinquent taxes, and the State Land Office Board by quit claim deed or agreement transfers said parcel of land to a private owner, pursuant to Act 155 Michigan Public Acts 1939, as amended, so that the same is returned to the tax rolls for state and municipal taxes, is such parcel of land subject to an additional deficiency levy of taxes for the purpose of paying the debt of the drain district evidenced by its outstanding bonds?

5. Petitioners are advised and believe that said questions must under the law of this State, interpreted to conform with various provisions of the Constitution of the United States and State of Michigan hereinafter set forth, be answered in the affirmative. Petitioners allege that Section 18, Ch. X, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927 and Act 129 Michigan Public Acts 1939, provided for additional deficiency assessments after the bonds of said drain districts had all matured, to be levied in accordance with the percentages fixed in the original assessment rolls against every parcel of land in the drain district, except those which at the time of the additional levy are exempt by reason of an actual ownership by the State of Michigan, United States of America, or municipal corporations, (and used by them for governmental purposes,) and that nothing contained in Act 155 Michigan Public Acts of 1937, as amended, or any other statutes in pari materia, abrogated or curtailed such provision, or could as against petitioners or other holders of bonds of said district abrogate or curtail the same, and that any interpretation of same in the manner contended by respondents would violate Article I, Section 10, and [fol. 8] Amendment XIV, Section 1, of the Constitution of the United States, Article II, Sections 10 and 16, and Article X, Section 9, of the Constitution of the State of Michigan.

6. Petitioners are informed that respondents herein contend that said questions must be answered in the negative, their precise reasons therefor being unknown. There is thus presented an actual controversy between the parties upon points vitally material to petitioners and other holders of said bonds, which necessarily must be decided before further action toward the refunding of said bonds can be taken. Petitioners and other holders of said bonds must suffer a

loss of a substantial part of the security for the payment of their bonds if their contention in respect to the said questions is not upheld, for they are informed by respondents, and believe, that such information is substantially correct, that title to lands which bear approximately 45% of the original assessment for said drain has passed to the State because of tax delinquency, and that a large part of said lands have been transferred by the State Land Office Board by quit claim deeds or contracts under Act 155 Public Acts of 1939, as amended, and are now subject to ordinary state, county and municipal taxes. If such lands are to be exempt from additional deficiency taxes the burden of the debt will be thrown upon the remaining land and the governmental subdivisions taxed at large, and this burden may be beyond the capacity of such other lands and such governmental subdivisions to fully discharge.

7. Wherefore, petitioners pray that the Court, by virtue of the powers conferred by Sections 13903 to 13909 Michigan Compiled Laws 1929, enter a judgment making a binding declaration of rights as follows:

[fol. 9] I. That respondents are now obliged by Section 18, Ch. X, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927 and Act 129 Michigan Public Acts 1939, to levy and spread, in accordance with the percentages in the original assessment roll for said drain against the governmental subdivisions taxed at large therefor and against all lands in the district not owned by the United States, State of Michigan or municipalities, and used by them for governmental purposes, an additional deficiency assessment sufficient when collected to pay all outstanding bonds of said district and interest thereon.

II. That if refunding bonds and certificates of indebtedness are issued, the Drain Commissioner, pursuant to Act 129 Michigan Public Acts 1939, shall provide, subject to the directions of the Public Debt Commission, for such additional levies of assessments prior to the maturity of such refunding bonds and certificates of indebtedness as he shall deem necessary to prevent default in payment of interest on such obligations, and the maintenance of a sinking fund for their retirement, such additional assessments to be made in accordance with the percentages in the original assessment roll against the governmental subdivisions taxed

at large for said drain, and all lands in the district which at the time of such levies are not owned by the United States, the State of Michigan and municipalities, and used by them for governmental purposes.

III. That the provision contained in paragraph 11 of the order of the Drain Commissioner, dated April 9, 1942, if approved by the Michigan Public Debt Commission, may lawfully be performed.

IV. That no lands in said district shall be excluded from any additional deficiency assessment roll, by reason of the [fol. 10] fact that the State had acquired title thereto and subsequently has transferred the same to private owners by deed or contract made pursuant to Act 115 Michigan Public Acts 1937, as amended.

Kenneth M. Keefe, Wallace D. Bradford, Petitioners, by Irvin Long, Their Attorney.

* * * * * * *

[fol. 11] EXHIBIT 1 TO PETITION

United States of America

Number		Dollars
211	State of Michigan	1000

County of Oakland

East Clawson Storm Sewer Drain District Bond

Know All Men By These Presents, that the East Clawson Storm Sewer Drain District of the County of Oakland, State of Michigan, is justly indebted and, for value received, hereby promises to pay to the bearer hereof the sum of One Thousand Dollars lawful money of the United States of America, on the first day of May, 1936, with interest thereon at the rate of 5½% per annum, payable semi-annually on May 1 and November 1 of each year on presentation and surrender of the annexed interest coupons as they severally become due. Both principal and interest of this bond are payable at the National Bank of Commerce, Detroit, Mich.

This bond is one of a series of three hundred bonds of like date and tenor, except as to date of maturity, aggregating the sum of $300,000.00 issued under authority of and in full compliance with the provisions of Act No. 316 of the Public Acts of Michigan, 1923, as amended by Act No. 365

of the Public Acts of Michigan, 1925 and Act No. 331 of the Public Acts of Michigan, 1927.

The principal and interest of this bond are payable out of the installments of drain taxes assessed against the lands in the said district and against the County of Oakland, the Village of Clawson and the Townships of Royal [fol. 12] Oak and Troy at large, in proportion to their respective taxation for such improvement as follows: lands in District 77.5%, Oakland County 3.5%, Troy Township 2.5%, Royal Oak Township 6.5%, Village of Clawson 10%, and are issued for the payment of the cost of construction of the East Clawson Storm Sewer Drain in the Townships of Royal Oak and Troy in said Oakland County, under and in pursuance of the statutes aforesaid and by lawful authority, and the amount of said issue does not exceed the aggregate of the installments of such drain taxes levied, and in case the amount available in the drain fund for said drain shall be insufficient to pay the principal or interest of any of said bonds when they become due the same shall be advanced and paid by the County of Oakland out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the County shall not cause the total debt of the County to exceed the constitutional limitation thereof.

It is hereby certified and recited that all acts, conditions and things required to be done, precedent to and in the issuance of this bond, in order to make it a binding obligation of the East Clawson Storm Sewer Drain District, have been done, have happened and have been performed in due form and time as required by law, and for the prompt payment hereof and of the interest hereon the full faith, credit and resources of said Drain District are hereby irrevocably pledged.

In Witness Whereof, the Drain Commissioner of the County of Oakland for and on behalf of said East Clawson Storm Sewer Drain District has caused this bond to be signed by the County Drain Commissioner and counter- [fol. 13] signed by the County Clerk of said County of Oakland as of the first day of November, A. D., 1927.

A. W. Spencer, Drain Commissioner, Oakland County, Michigan.

Countersigned: B. P. Dougherty, County Clerk, Oakland County, Michigan.

Exhibit 2 to Petition

To Holders of—

5½% Bonds, dated November 1, 1927, issued by the

East Clawson Storm Sewer Drain District
Oakland County, Michigan

There are attached hereto

Order (made April 9, 1942) of the County Drain Commissioner
Exhibit D—Special Assessment Roll
Exhibit E—Analysis of Receipts and Disbursements
Exhibit F—Analysis of Current Collections by Municipalities
Exhibit G—Analysis of Special Assessment Roll by Subdivisions

Paragraph 16 of this Order provides that its escrow provisions (paragraphs 16 to 22, inclusive) shall become effective when bonds in the aggregate principal amount of [fol. 14] $168,000 (75.3%) shall have been deposited with the Escrow Agent. These provisions involve application of available funds to discharge of interest from May 1, 1937, on the following basis:

To May 1, 1939 2 years		
101 bonds @ 1½% or	$30.00	$3,030.00
Nov. 1, 1939 ½ year		
199 bonds @ 2% or	10.00	1,990.00
Nov. 1, 1940 1 year		
201 bonds @ 2% or	20.00	4,020.00
May 1, 1942 1½ years		
223 bonds @ 2% or	30.00	6,690.00
		15,730.00
Reserve equal to 11-1-42 and 5-1-43 coupons—223 bonds @ $25.00		5,575.00

and thereafter to discharge (in chronological order) unpaid coupons and accrued interest from May 1, 1931, at 2.75% rate (50% of face). Note that funds will be exhausted by application to bonds actually on deposit, although, as additional bonds may be subsequently deposited,

they will be placed on a parity with deposited bonds as rapidly as accumulation of funds permits.

Provision is made for certain expense charges (limited to 4% of the principal amount) applicable to all bonds deposited and the manner of terminating the escrow arrangement if the bonds cannot be refunded by January 1, 1944.

Paragraph 15 sets forth the legal conditions that must be satisfied before refunding obligations may be issued under the provisions of paragraphs 1 to 14, inclusive. If and when issued, the refunding obligations will be as follows:

[fol. 15] 30-year callable Refunding Bonds, dated as of May 1, 1937, with interest (payable semi-annually) at

1.5% for 2 years	3.0% for 5 years
2.0% for 3 years	3.5% for 5 years
2.5% for 5 years	4.0% for 10 years

10-year non-interest bearing Certificate of Indebtedness, dated as of May 1, 1942 (to be tendered to the District at 50% of their face value).

Deficiency assessments (of not to exceed 5% of the original assessments) to be levied annually from 1947 to 1965 and in such amounts as needed to retire the refunding obligations in 1966.

Comments

Refunding negotiations have been carried on with representatives of holders of a substantial proportion of the outstanding bonds since 1940. While a Refunding Plan was being put into shape for formal submission to all parties involved, the Supreme Court of the State of Michigan handed down (June 30, 1941) an opinion in the case of Municipal Investors Association vs. the City of Birmingham, 298 Mich. 314, in which the court held that certain amendments to the general tax laws made in 1937 and 1939 and the enactment of the so-called Scavenger Sale Act, as applied to a special assessment district in said city, barred the levying of deficiency assessments against property acquired by the State of Michigan at recent tax sales, even though it was subsequently sold to private owners. Inasmuch as a substantial deficiency assessment will be necessary in order to pay the principal and interest on

the outstanding bonds of this drain district (or any new bonds issued for the purpose of refunding said outstanding bonds), it has been mutually agreed that no refunding [fol. 16] should be attempted pending the appeal of the Birmingham case to the U. S. Supreme Court. The county officials feel that, if the decision of the State Court is sustained, then, there will have to be a radical modification in the proposed refunding plan.

Method of Acceptance

Holders of a large majority of the bonds have already indicated their intention of depositing their bonds under the Order.

If it is acceptable to you, please forward your bonds to the Escrow Agent—Detroit Trust Company, Detroit, Michigan—accompanied by two copies of the Letter of Transmittal. A transferable Escrow Certificate will be issued to you by the Escrow Agent. As funds become available, payments will be made to registered holders of Escrow Certificates.

Inquiries should be addressed to Matthew Carey, Refunding Agent, 2406 Union Guardian Bldg., Detroit, Michigan.

April 15, 1942.

* * * * * * *

[fol. 17] Submit in Duplicate with Bonds

(Drain Commission Order for Refunding Bonds)

Order made this 9th day of April, 1942, by Earl L. Clark, County Drain Commissioner of the County of Oakland, State of Michigan.

Witnesseth:

Whereas, the East Clawson Storm Sewer Drain District, in Oakland County, Michigan, (hereinafter called the "Drain District"), pursuant to the provisions of Act No. 316 of the Public Acts of Michigan for 1923, as amended, (hereinafter called the "Drain Act"), and in anticipation of the collection of the special assessments hereinafter [fol. 18] referred to, issued bonds in the aggregate principal sum of $300,000, dated November 1, 1927, payable serially as follows: $20,000 on May 1 of each year from 1929 to 1930, both inclusive, $30,000 on May 1 of each

year from 1931 to 1936, both inclusive, and $40,000 on May 1 of each year from 1937 to 1938, both inclusive, and bearing interest at the rate of 5½% per annum, of which there remain outstanding the following bonds aggregating the principal sum of $223,000, to-wit:

. . . . . .

[fol. 19] together with interest from May 1, 1937 to date on all of said outstanding bonds at 5½% per annum except as hereinatter indicated; and

. . . . . .

Whereas, the aforesaid bonds were issued in anticipation of the collection of assessments made pursuant to said Drain Act to defray the cost of the construction of a drain in said district, which assessments originally were in the aggregate principal sum of $30,000.00 (plus overrun), divided into ten annual instalments, to be spread upon the tax rolls in the years 1928 to 1937, both inclusive; and

Whereas, the said Drain District did not spread upon the tax rolls of the years 1932 to 1937, both inclusive, the installments of the said assessments which should have been spread in those years and also did not spread upon [fol. 20] the tax rolls of those years the interest upon the unpaid balance of said assessments for the twelve (12) months' period ending December 1 of each such year; and

Whereas, pursuant to an order of the County Drain Commissioner and in anticipation of the refunding of the outstanding bonds of the East Clawson Storm Sewer Drain District under the provisions of Act No. 13 of the Public Acts of 1932, First Extra Session, a supplemental special assessment roll was adopted in the year 1937 by virtue of which, first, annual installments Nos. 5 to 10, both inclusive, of said original assessment roll, due in the year 1932 to 1937, both inclusive, aggregating the principal sum of $180,140.00, were divided into twenty-five equal annual instalments of $7,205.60 each, the first instalment to be spread upon the tax roll of the year 1937 and one annual instalment on the tax roll of each year thereafter until 1961, inclusive; and, second, the amount of interest accrued upon the principal of said instalments Nos. 5 to 10, both inclusive, from December 1, 1931 to May 1, 1937, at 6%

per annum, aggregating $58,545.50, was divided into ten annual instalments of $5,854.55 each, the first instalment to be spread upon the tax roll of the year 1937 and one annual instalment to be spread upon the tax roll of each year thereafter until 1946, inclusive; and

Whereas, in each of the years from 1937 to 1941, both inclusive there was spread upon the tax rolls of such year, the annual instalment of said supplemental special assessment roll maturing in such year, plus current interest upon all outstanding instalments at 6% per annum as provided in said Drain Act; and

[fol. 21] Whereas, a refunding of the outstanding bonds issued by said Drain District is necessary because of defaults in the payment of principal and interest on said bonds, which defaults exist and have existed for some years owing to the non-payment of a large amount of the assessments for the construction of said East Clawson Storm Sewer Drain, heretofore spread upon the tax rolls, and because of the cancellation under the provisions of the general tax laws of the State of Michigan and Act No. 155 of the Public Acts of 1937, as amended, of not only the delinquent instalments of such assessments but also of the instalments to be spread upon the tax rolls in future years; and

Whereas, the financial condition of said Drain District warrants as a matter of sound municipal financing, the refunding of the principal of said outstanding bonds and the refunding of the unpaid interest accrued thereon to May 1, 1937, all as hereinafter provided; and

Whereas, the additional levies required in this order are deemed necessary to prevent default in the payment of interest on the refunding bonds herein proposed to be issued and for the maintenance of a sinking fund for the retirement of said refunding bonds and the certificates of indebtedness hereinafter authorized;

Therefore, it is hereby ordered, as follows:

1. That subject to the conditions set forth in paragraph 15 of this order and subject to the approval of the Public Debt Commission, the principal of the above described outstanding bonds of said East Clawson Storm Sewer Drain District, aggregating the principal sum of $223,000, shall be refunded into a like amount of refunding bonds to be known

as "East Clawson Storm Sewer Drain District Refunding Bonds," which refunding bonds shall be numbered consecu-
[fol. 22] tively from 1 to 223, both inclusive, shall be in the denomination of $1,000 each, shall be dated as of May 1, 1937, shall mature May 1, 1967, shall bear interest at the rate of 1½% per annum from May 1, 1937 to May 1, 1939, at the rate of 2% per annum from May 1, 1939 to May 1, 1942, at the rate of 2½% per annum from May 1, 1942 to May 1, 1947, at the rate of 3% per annum from May 1, 1947 to May 1, 1952, at the rate of 3½% per annum from May 1, 1952 to May 1, 1957, and at the rate of 4% per annum thereafter until paid, said interest to be payable semi-annually on May 1 and November 1 of each year. Each of said refunding bonds shall have proper interest coupons attached thereto evidencing interest thereon to date of maturity from May 1, 1937 or such subsequent date as to which interest shall have been discharged on the principal amount refunded, by payments heretofore made as above set forth or by payments hereafter made in accordance with this order. The principal of said refunding bonds and interest thereon, shall be payable in lawful money of the United States of America at the Detroit Trust Company, in the City of Detroit, Michigan, or at its successor paying agent named by the County Drain Commissioner of Oakland County, which shall be a responsible bank or trust company in the City of Detroit, Michigan.

2. Said refunding bonds shall be subject to redemption from time to time prior to maturity on any interest payment date at par plus accrued interest, provided notice is given to the holders of bonds to be redeemed, by publication of such notice not less than thirty (30) days prior to the redemption date at least once in a newspaper or publication circulated in the City of Detroit, Michigan, which carries as a part of its regular service notices of the sale of munici-
[fol. 23] pal bonds. Refunding bonds so called for redemption shall not bear interest after the redemption date specified in such notice, provided funds are on hand with the paying agent to redeem the same. Refunding bonds shall be selected for redemption by lot by the then paying agent from all the outstanding bonds of said issue.

3. That subject to the conditions set forth in paragraph 15 of this order and subject to the approval of the Public Debt Commission, the said unpaid interest accrued to May

1, 1937, amounting to $33,400.00; less any amounts hereafter discharged, shall be refunded by the issuance of certificates of indebtedness to be known as "East Clawson Storm Sewer Drain District Certificates of Indebtedness," to be dated as of May 1, 1942, to mature May 1, 1952, and to be non-interest bearing prior to maturity but thereafter to bear interest at the rate of 3% per annum until paid. The principal of said certificates of indebtedness and the interest thereon, if any, shall be payable in lawful money of the United States of America at the Detroit Trust Company, in the City of Detroit, Michigan, or at its successor paying agent named by the County Drain Commissioner of Oakland County, which shall be a responsible bank or trust company in the City of Detroit, Michigan. One such certificate of indebtedness shall be issued for the interest to be redeemed on each outstanding bond, provided, however, that when one person holds more than one such bond, then one or more certificates of indebtedness may be issued for the interest to be refunded thereon, in such denomination or denominations not exceeding $1,000 as may be agreed upon between such holder and the County Drain Commissioner of the County of Oakland; and provided further that in any case [fol. 24] certificates of indebtedness shall be issued in such denominations as may be necessary to carry out the provisions of paragraph 20 of this order.

4. Said certificates of indebtedness shall be subject to redemption from time to time prior to maturity on May 1 and November 1 of each year at par. Certificates of indebtedness shall be selected for redemption by lot by the then paying agent from all the outstanding certificates of indebtedness of said issue. Notice of such redemption shall be published not less than thirty (30) days prior to the redemption date at least once in a newspaper or publication circulated in the City of Detroit, Michigan, which carries as a part of its regular service, notices of the sale of municipal bonds.

5. Said refunding bonds and certificates of indebtedness shall be continuations of the obligations refunded thereby as provided in subdivision (e) of Section 4 of Act No. 13 of the Public Acts of Michigan, First Extra Session of 1932, as amended by Act No. 128 of the Public Acts of Michigan, 1939.

6. Said refunding bonds and attached coupons and said certificates of indebtedness shall be in such form as shall be approved by the attorneys approving the validity thereof.

7. Said refunding bonds and certificates of indebtedness shall be exchanged for the obligations to be refunded thereby on a par basis.

8. When the first fourteen paragraphs of this order shall become effective, there shall be established and thereafter maintained a fund to be known as the "East Clawson Storm Sewer Drain Interest and Sinking Fund" into which shall be placed all money then in or belonging to the "East Clawson Storm Sewer Drain Redemption Fund" all collections [fol. 25] thereafter made of existing East Clawson Storm Sewer Drain taxes or assessments (including future due installments) and of any taxes or assessments thereafter levied for the payment of the said outstanding obligations of said East Clawson Storm Sewer Drain District or for the payment of any obligations which may be issued for the purpose of refunding those now outstanding; and any other moneys allocable to the payment of the outstanding or refunding obligations of said Drain District, including any moneys received under the provisions of Act No. 155 of the Public Acts of 1937, as amended.

9. Said "East Clawson Storm Sewer Drain Interest and Sinking Fund" shall be used for the following purposes, to-wit:

(1st) For the payment of any unpaid fees and expenses specified in subparagraphs (1) and (2) of paragraph 17 of this order;

(2nd) To pay any expenses in connection with the issuance of said refunding bonds and certificates of indebtedness;

(3rd) To pay interest on said refunding bonds as the same accrues;

(4th) To retire refunding bonds and certificates of indebtedness as hereinafter provided.

10. The supplemental special assessment roll hereinbefore referred to, made by the County Drain Commissioner of the County of Oakland, in the year 1937, by which unspread instalments Nos. 5 to 10, both inclusive, of the origi-

nal assessment roll for the construction of said East Clawson Storm Sewer Drain, were divided into twenty-five annual instalments to be spread in the year 1937 and subse-
[fol. 26] quent years and by which the unspread interest on outstanding assessments was divided into ten annual instalments to be spread in the year 1937 and subsequent years, is hereby ratified and confirmed, both as to the instalments which have been already spread upon the tax rolls and the instalments which are to be spread upon such rolls in the future, and it is hereby ordered that instalment No. 6 of said supplemental special assessment roll shall be spread upon the tax rolls of the year 1942 and in numerical order one of the remaining instalments shall be spread upon the tax roll of each year thereafter.

11. An annual accounting shall be made on August 1 of each year, commencing with the year 1947, of the amount of outstanding bonds and certificates, if any, and of the amount in said "East Clawson Storm Sewer Drain Interest and Sinking Fund." Beginning with the year 1947 there shall be levied upon the tax roll of each year an amount sufficient to pay the interest maturing during the next calendar year and in addition thereto an amount equal to the principal of the refunding bonds and certificates of indebtedness (if any) outstanding on August 1 of such year of levy, divided by the number of years remaining between May 1 of such year and May 1, 1967 (the dividing figure being 20 for the year 1947 and one less for each subsequent year). If the amount of the instalment of the 1937 supplemental special assessment roll to be spread upon the tax roll of any such year (exclusive of any part thereof cancelled by the terms of Act No. 155 of the Public Acts of 1937, as amended, and similar provisions of the general tax laws), shall not be equal to the amount to be levied under the requirements of the foregoing sentence, then any such difference shall be levied under the provisions of Act No. 129 of the Public Acts
[fol. 27] of 1939, against the various political subdivisions and parcels of land in the special assessment district, in proportions as originally assessed; provided that the additional levies herein required to be made under the provisions of Act No. 129 of the Public Acts of 1939 against each such political subdivision or parcel of land, shall not in any year prior to the year 1965 exceed 5% of the original assessment against the same. In determining the total amount to be levied each year, there shall be deducted any moneys

in the interest and sinking fund available for the retirement of the refunding bonds and certificates of indebtedness.

12. If, between May 1 and October 31 of any year, there shall be an amount in the "East Clawson Storm Sewer Drain Interest and Sinking Fund" in excess of the succeeding November 1 and May 1 interest requirements on all outstanding refunding bonds and if, between November 1 of any year and April 30 of the following year, there shall be an amount in said fund (exclusive of collections made upon current taxes becoming due during such period) in excess of the succeeding May 1 interest requirements on said refunding bonds, all prior interest requirements having been met or provided for, the County Drain Commissioner shall advertise for tenders of refunding bonds and certificates of indebtedness (if any) as provided in Section 8 of Act 13, Public Acts of 1932, First Extra Session, as amended, and if tenders are received at or below par and accrued interest, he shall purchase bonds and/or certificates of indebtedness so tendered, at the lowest price or prices (taking into consideration the interest factor to May 1, 1952) to the amount of such excess; provided that the County Drain Commissioner shall not be required to so [fol. 28] advertise for tenders if the amount of such excess is less than $10,000.00. If sufficient tenders are not received to consume the moneys available therefor, then the County Drain Commissioner shall call refunding bonds for redemption at the earliest possible date to the amount so available, provided that he shall not be required to so call refunding bonds for redemption in smaller amounts than $10,000.00. Bonds shall be selected for redemption by lot by the then paying agent from all bonds of said issue then outstanding. The foregoing provisions of this paragraph in respect to advertising for tenders of the refunding bonds and certificates of indebtedness and in respect to the calling of refunding bonds for redemption, shall be subject to the requirement that if certificates of indebtedness of a par value in excess of $6,000.00 shall be outstanding on May 1, 1949, then there shall be set aside from said interest and sinking fund after the aforesaid provisions shall have been made for interest, an amount equal to such excess, and if certificates of indebtedness of a par value in excess of $3,000.00 shall be outstanding on May 1, 1950, then there shall be set aside from said interest and sinking fund after the aforesaid provisions shall have been made for interest, a sum equal to such excess, and if there shall be any cer-

tificates of indebtedness outstanding on May 1, 1951, then there shall be set aside from said interest and sinking fund after the aforesaid provisions have been made for interest, and amount sufficient to retire said certificates of indebtedness on May 1, 1952. The moneys so set aside for the retirement of certificates of indebtedness shall be used for the retirement of same upon tenders or if sufficient tenders shall not be received, then for the redemption of such certificates of indebtedness at par.

[fol. 29] 13. The County Drain Commissioner of Oakland County, Michigan, and the County Clerk of said county, shall sign and countersign, respectively, said refunding bonds and certificates of indebtedness for and on behalf of said East Clawson-Storm Sewer Drain District, and shall cause the interest coupons annexed to said bonds to be executed with their facsimile signatures; and upon the execution of said bonds and certificates, the same shall be delivered by the County Drain Commissioner to the Detroit Trust Company for exchange for the obligations to be refunded thereby.

14. At the time of the exchange of the refunding obligations herein authorized, for the obligations refunded thereby, the district shall furnish the opinion of Miller, Canfield, Paddock and Stone approving the validity of said refunding obligations.

15. Paragraphs 1 to 9 and 11 to 14, all inclusive, of this order shall not become effective until there has been established by decision of the Supreme Court of the State of Michigan or the Supreme Court of the United States, the principle that additional assessments such as those authorized under Act No. 129, Public Acts, 1939, can be legally levied against properties sold by the state under Act No. 155, Public Acts, 1937, as amended, where the original assessment roll pre-dates the acquisition by the state of the absolute title under the Michigan tax laws. Whenever either the Corporation Counsel of the County of Oakland or persons holding a majority in amount of the bonds deposited with the escrow agent as hereinafter provided, shall deem said principle to have been established as above provided and shall have evidenced his or their opinion in writing filed with the escrow agent, then the latter shall immediately thereafter mail copies of such opinion to each person whose

[fol. 30] bonds are on deposit with it and to the Drain Commissioner of the County of Oakland and to the Corporation Counsel of the County of Oakland. Unless the correctness of such opinion of the Corporation Counsel or of the bondholders shall be questioned in a court of proper jurisdiction within twenty (20) days after the mailing of such notice, the escrow agent shall have authority to proceed to accomplish the aforesaid refunding as to the bonds deposited in escrow with it.

16. Pending the establishment of the principle set forth in the foregoing paragraph, the outstanding bonds and unpaid interest coupons pertaining thereto shall be deposited with the Detroit Trust Company as escrow agent under the terms of this order. The fees and expenses of said escrow agent in the performance of its duties as set forth in this order shall be paid by the Drain District. The escrow provisions of this order shall become effective when there shall have been deposited with said escrow agent, bonds of said East Clawson Storm Sewer Drain District aggregating in principal amount the sum of $168,000.00 together with all unpaid interest coupons pertaining thereto, and if bonds in such amount shall not have been deposited on or before ninety (90) days from the date of this order, then the bonds so deposited shall be returned by the escrow agent to their respective holders and this order shall become null and void except as to the payment of any fees and expenses already incurred thereunder. The escrow agent may accept bonds without unpaid coupons where such unpaid coupons have been lost, upon approval of the County Drain Commissioner. Where bonds and coupons are held by state agencies and insurance companies, the escrow agent may in lieu [fol. 31] of the actual deposit of such bonds and coupons, accept agreements subjecting the same to the terms of this order, and in such case the bonds and coupons shall be deemed to have been deposited.

17. Pending the establishment of the principle set forth in paragraph 15 of this order, all money now on hand and hereafter acquired in the East Clawson Storm Sewer Drain Redemption Fund shall be used for the following purposes:

(1st) To pay expenses incurred by the Drain Commissioner in connection with the consummation of the provisions of this order, as the same shall from time to time accrue;

(2nd) To pay the fees and expenses of the escrow agent as the same shall from time to time accrue;

(3rd) To discharge interest from May 1, 1937 to November 1, 1941 upon such of the outstanding bonds of said Drain District as shall be escrowed, as herein provided, by the payment of the sum of $7.50 in full discharge of the interest accruing for each semi-annual period from May 1, 1937 to May 1, 1939, and the sum of $10.00 in full discharge of the interest accruing for each semi-annual period from May 1, 1939 to November 1, 1941, upon each $1,000 bond;

(4th) To discharge interest accruing during each semi-annual period subsequent to November 1, 1941 upon such bonds as shall be deposited in escrow as herein provided, by the payment of a sum equal to the interest hereinbefore provided to be paid during such period upon refunding bonds had the same been issued prior to such period, said payments to be in full satis- [fol. 32] faction of the interest accruing during such semi-annual period upon the escrowed bonds and shall be made on May 1 and November 1 of each year;

(5th) To discharge the interest accrued from May 1, 1931 to May 1, 1937 upon each bond which shall be deposited in escrow hereunder, by the payment of $13.75 upon each $1,000 bond for each semi-annual period subsequent to May 1, 1931. The interest for each such semi-annual period upon all bonds deposited in escrow as herein provided shall be satisfied in chronological order as rapidly as funds accumulate sufficient therefor, so that all unpaid interest upon bonds so deposited, for the first semi-annual period after May 1, 1931, shall be satisfied before any unpaid interest shall be satisfied upon any bonds for the second semi-annual period and the same rule shall prevail as to each semi-annual period thereafter. As additional bonds are subsequently deposited with the escrow agent, funds thereafter becoming available for the discharge of interest accrued to May 1, 1937, shall be used first to place such subsequently deposited bonds in the same status as bonds already on deposit in respect to such interest payments. Provided that no moneys shall be used for the payment of interest under this paragraph until

there shall have been first set aside by the escrow agent a sufficient amount to pay the interest due under subdivision "(4th)" above, on the following two semi-annual interest payment dates.

When any semi-annual interest has been discharged as aforesaid, if such interest is evidenced by an interest coupon, then the same shall be surrendered and cancelled but if [fol. 33] such interest is for a period subsequent to the maturity date of the bond, then substantially the following endorsement shall be placed upon each bond upon which interest shall be so paid:

By payment made this day, interest on the within bond from ——— to ——— has been fully satisfied.
——— ———, by ——— ———, Escrow Agent under Order of ——
of County Drain Commissioner,
Dated ———.

18. The district shall deposit with the escrow agent the sum of $16,636.78 on hand on December 31, 1941 plus any additional moneys subsequently received, (less any amount to be retained for the fees and expenses mentioned in subdivisions 1 and 2 of paragraph 17), within ten (10) days after there shall have been deposited with the escrow agent bonds of the East Clawson Storm Sewer Drain District, aggregating the principal sum of $168,000.00, together with all interest coupons pertaining thereto, and on or before the tenth of each month thereafter beginning with the month of April, 1942, said Drain District shall deposit such moneys as shall have become available during the preceding month (less any additional amounts necessary for such fees and expenses) to be used in the discharge of interest as hereinbefore provided, with instructions to said escrow agent to discharge such interest as provided in paragraph 17 of this order.

[fol. 34] 19. Said escrow agent shall disburse the moneys so deposited with it in settlement of interest as provided in paragraph 17 of this order, provided that there shall be deducted from moneys paid in discharge of interest heretofore or hereafter accrued on each bond, an amount equal to 50% of such payments until the amount so deducted shall equal the sum of $40.00 upon each bond, which amount so deducted shall be paid to the Bondholders' Com-

mittee—Storm Sewer Drain Districts in Michigan, presently composed of Kenneth M. Keefe, E. E. Quantrell and P. C. Wilmerding, to cover fees and expenses (whether heretofore or hereafter incurred) of said committee in respect to the bonds of said Drain District; provided, however, that as to those bonds so deposited in escrow which have paid to said committee an amount equal to $40.00 per bond, there shall be no such deduction. The fees and expenses above referred to shall, among others, comprise those incurred in connection with the formulation of this order and the servicing thereof, including counsel fees in connection with litigation to establish the principle referred to in paragraph 15 above. Said committee shall agree to file with the escrow agent annually on or before December 1st of each year, a statement of their receipts and disbursements for the year ending on October 31st preceding, in respect to the East Clawson Storm Sewer Drain District bonds. Nothing herein contained shall require said escrow agent to account to depositing bondholders for money deposited with it until such moneys shall be sufficient to discharge interest for a semi-annual period.

20. Upon the happening of the conditions specified in paragraph 15 of this order, the County Drain Commissioner shall file application with the Michigan Public Debt [fol. 35] Commission for the approval of the refunding plan set forth in this order and shall take all necessary steps to promptly effect the refunding of the outstanding indebtedness in accordance with this order and when the bonds and certificates of indebtedness shall have been executed, the same shall be deposited with the said escrow agent who shall then exchange said refunding bonds and certificates of indebtedness for the respective outstanding obligations to be refunded thereby. The escrow agent shall return the bonds to the persons entitled thereto as shown on its books, but shall retain the certificates of indebtedness, if any, and from time to time shall tender the same at an amount equal to 50% of their face value. Certificates of indebtedness shall be made in such denominations so as to effect a pro rata tender from time to time as to all certificates of indebtedness held by the escrow agent.

21. If the principle set forth in paragraph 15 of this order shall not be established prior to January 1, 1944, then

the escrow agent shall notify the persons who have deposited bonds in escrow with it and unless other directions acceptable to the escrow agent are given within sixty (60) days thereafter, the escrow agent shall return the bonds and attached coupons, if any, to the several persons entitled thereto and in such case the escrow agent shall return to the County Treasurer any undisbursed moneys deposited with it for distribution.

22. Any person depositing bonds and coupons in escrow under the terms of this order, may thereafter sell the same including any portion of the interest accrued between the bond maturity date and May 1, 1937, for use in the payment of assessments against said Drain District, if the [fol. 36] acceptance of the same in payment of such assessments is permitted under resolution of the Board of Supervisors of Oakland County. In event of such sale the depositor shall instruct the escrow agent to deliver the obligations so sold to the Treasurer of the County of Oakland, to be used solely as a credit for the payment of the assessments against said Drain District. The price for which any securities are so sold shall be paid to the escrow agent who shall deduct any moneys due to said Bondholders' Committee and shall remit the balance to the depositor.

Earl L. Clark, (Signed) County Drain Commissioner, Oakland County, Michigan.

[fol. 37] IN CIRCUIT COURT OF OAKLAND COUNTY

ANSWER TO PETITION FOR DECLARATORY JUDGMENT—Filed August 15, 1942

Come now Earl L. Clark, Drain Commissioner of the County of Oakland and the Board of Supervisors of the County of Oakland, entering their appearance in the above entitled cause and making answer to the subsequent allegations as follows:

I

They neither admit or deny the allegations therein contained, having no knowledge thereof and leave Plaintiffs to their proofs thereon;

II

They admit the allegations therein contained.

III

They admit the allegations in the first two sentences contained and admit that Petitioners contend as claimed in the third sentence but deny that their contention is correct averring the fact to be

1. (a) That a large portion of the original drain district approximately forty-five per cent (45%), reverted to the State for non-payment of taxes on the several parcels or descriptions therein:

(b) That all taxes and the lien therefor, including drain taxes and deferred installments thereof, were cancelled on the lands referred to in paragraph (a) above;

(c) That the original assessment district as such is no longer in existence;

[fol. 38] (d) That the remaining portion of the original district was never intended to pay the entire cost of the project, is financially unable to do so and to throw the burden of the original cost on the remainder of the district would confiscate all the property therein;

(e) That the original assessment was on the theory of benefit to the property taxed and the radical reduction of the amount of parcels would increase the assessment against the remaining parcels without a corresponding benefit, contrary to the theory of this type of special assessment, and such an assessment would be illegal and unconstitutional.

IV

Respondents deny that an actual controversy exists for the reason that all the questions as stated by Petitioners have been passed upon and decided against the contention of Petitioners by the Supreme Court of Michigan;

(a) Respondents respectfully submit that the propounded question (a) has been answered by the decision in the negative in Municipal Investors vs. City of Birmingham, decided by the Michigan Supreme Court, July 2nd, 1941;

(b) Respondents deny the pertinence of the question propounded in Paragraph IV, (b), for the reason that the Michigan Supreme Court has passed upon and decided this question against the contention of Petitioners;

(c) Respondents submit that this question as propounded by Petitioners has been answered in the negative in Municipal Investors vs. the City of Birmingham, decided by the Michigan Supreme Court July 2nd, 1941.

[fol. 39]

V

Respondents admit that the disposition of the matter in controversy must be in conformance with the laws of the land but deny that in order to do so affirmative answers must be given to the questions propounded by Petitioner.

Respondents admit that the law cited by Petitioner provides for "Additional deficiency assessments * * * to be levied in accordance with the percentages fixed in the original assessment rolls," but denies that it would be legal or constitutional, with the district greatly reduced, to so tax the remaining lands.

VI

As stated in the foregoing portions of this Answer, Respondents do claim that Petitioner's propounded questions should be answered in the negative but deny that an actual controversy is presented here because all the questions propounded by petitioners herein have been settled by the Michigan Supreme Court unfavorable to the Petitioners.

VII

Respondents deny that there is an actual controversy before the Court for the reason stated above and deny that any refunding should take place. Respondents, further answering, deny that Petitioners are entitled to the Declaration of Rights sought in Paragraph 7, I, II, III, and IV.

Respondents neither admit nor deny that Petitioners will suffer a loss on their bond but do aver that if they suffer a partial loss they will suffer no more than taxpayers who were expected to pay these taxes and who have lost their lands have suffered, and Respondents respectfully submit [fol. 40] that there is nothing more sacred about a bondholder than a taxpayer.

Respondents admit that approximately forty-five per cent (45%) of the original assessment district is no longer subject to assessment under the decision in Municipal Investors vs. the City of Birmingham and that if Petitioner's contentions are correct forty-five per cent (45%) of the original cost of the project would be thrown on the remain-

ing fifty-five per cent (55%) of the district without a corresponding benefit and with not only the possibility but the probability of confiscation of the remaining portion of the original district.

VIII

Wherefore, Respondents pray that the Petition be dismissed and that this answer may stand as a motion to dismiss to be brought on for hearing at the time the case reaches trial.

Your respondents further move to dismiss for the reason that this Court does not have jurisdiction over the subject matter of this case under Sections 13903 to 13909 inclusive, Michigan Compiled Laws of 1929 as alleged by Petitioner for the reason that it is not the purpose of the declaratory judgment act to grant relief in cases where there are numerous disputed questions of fact and where the petition for relief under the declaratory judgment act is used as a substitute for the ordinary form of action as in this case.

(Signed) Harry J. Merritt, Corporation Counsel.

[fol. 41] In Circuit Court of Oakland County

Stipulation Providing for Amendment of the Petition and Answer—Filed November 13, 1942

The parties hereto, by their respective counsel, hereby agree that the petition may be, and is hereby, amended to substitute 1937 for 1939 as appearing in paragraph 4 (c), bottom of page 3, and in paragraph 6, line 6, page 5, and that the answer may be, and is hereby, amended to substitute the following for paragraph 1 thereof:

"They admit the allegations contained in Paragraph I of the petition."

Voorhies, Long, Ryan & McNair, Dykema, Jones & Wheat, Attorneys for Plaintiffs. Harry J. Merritt, Attorney for Defendants.

In Circuit Court of Oakland County

Opinion of the Court—Filed December 16, 1942

Petitioners as holders of bonds of the East Clawson Drain District seek a declaratory judgment to determine the ob-

ligation of the respondent drain commissioner to impose a deficiency assessment upon all the lands as determined benefited in the drain district.

An interesting factual circumstantial background, unessential of narration as a prerequisite of determination, is that out of an issue of bonds dated November 1st, 1927 in the principal sum of $300,000 to finance the cost of con-
[fol. 42] struction there remains due and unpaid the sum of $223,000 plus accrued interest from May 1st, 1939. The cost of improvement was distributed in these percentages: the district 77.5%; County of Oakland at large 3.5%; Township of Troy at large 2.5%; Township of Royal Oak at large 6.5% and Village, now City of Clawson at large 10%.

Proofs offered in the case show that 65% of the lands in the district are either retained or have been sold by the state as tax delinquent land, subject to the provisions of the Scavenger Sale Act, being Act No. 155 of Public Acts of 1937 as amended.

Respondents offer objection to a spread of the deficiency assessment, stating it is a factual and legal impossibility. The principal objection is that the aforementioned 65% of the lands in the district retained or sold by the state under Act No. 155 of Public Acts of 1937 as amended are not subject to the levy of such a deficiency assessment in the interpretation of Municipal Investors Association v. City of Birmingham, 298 Mich., 314.

Observations are here made in an endeavor to form an opinion based upon logical deductions. Bondholders acquire securities through a contract with the issuing unit of government within the confines of the law existent at time of issue.

The phraseology of Section 18, Chapter 11 of Act No. 331 of Public Acts of 1927 referred to as Section 4940 of Compiled Laws of 1929, M. S. A. 11.104 as amended by Act No. 129 Public Acts of 1939, a pertinent statute as of the date of issue of the bonds reads as follows, "If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, whether such insuffi-
[fol. 43] ciency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall

be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasury and be used for the maintenance of the drain."

Respondent county evidences concern over the provision of Section 4937 of the Compiled Laws of 1929 providing that, "In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore issued when they become due, the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes collected: Provided, That such advancement by the county shall not cause the total debt of the county to exceed the constitutional limitation thereof," and asks that it be construed as not making the bonds a general obligation or as pledging the full faith and credit of the county for their retirement. The question is vital to the ultimate full retirement of the bonds, but is not one of the objectives of the declaratory judgment sought by the petitioners.

Yielding to a hoped pardonable temptation, some comment is here made on the intriguing issue without an attempt at solution pronouncement. It is made to elicit interest of others vitally concerned not here litigant. The section is now repealed and the wisdom of its enactment apparently repudiated. The provision requiring advancement was held a sustainable legislative imposition incident to the act of the issuance of the bonds. Moore [fol. 44] v. Harrison, 224 Mich., 512. The rights and duties of a county are not based upon contractual relations. They are organized for public purposes and their powers, rights and duties may at any time be modified or abolished by legislative action. Township of Clearwater v. Board of Supervisors of Kalkaska County, 187 Mich., 516. This gives legislature right to dictate the application of general funds on hand raised for a public purpose as interpreted in University of Michigan v. Pray, 264 Mich., 693. The advance provision was there held a remedial mandatory right. It was held not subject to avoidance as to an interim issue by a change of the remedial provision in Whitman v. Township of Royal Oak, 269 Mich., 146. Some logic may be found in recognizing, in the furtherance of a public pur-

pose, an issuing unit of government to facilitate sale of special assessment bonds, may agree to advance from its general fund sums for payment in event of a special assessment fund deficiency.

It is exceeding- troublesome to find the limitation on advancement that must logically exist. It is stated in the case of the Township of Royal Oak v. City of Pleasant Ridge, 295 Mich. 284, to advance does not transform special assessment bonds into general obligation bonds or change their character. The cited cases seem to indicate the county is not relieved from advancing by reason of the fact that certain lands in the assessment district are lost through tax sale and there in no chance reimbursement and that advance is not predicated upon the possibility of reimbursement. May advance then be interpreted as a word implying general obligation liability carrying the full faith and credit of the county? If this is true the general fund of the county must meet the assault of hundreds of special assessment bond holders attacking for funds they obviously [fol. 45] will never receive from special assessment accounts.

The drain commissioner in establishing a drain project is not the agent of the county. He is performing a special statutory duty for the drain district. Section 4937 of the Compiled Laws of 1929 providing for the payment of special assessment bonds out of the general fund in event of a deficiency does not establish county liability. These are the holdings of Brooks v. County of Oakland, 268 Mich., 637. The problem of advancement resulting in a general obligation was left for further consideration in Township of Royal Oak v. Pleasant Ridge supra. When a case is established, as may be possible with the East Clawson Drain District, that exceeding county liability ensues through the hopelessness of reimbursement, that the orderly functions of county government are imperiled through advancement, that the county is building projects of great magnitude for the restricted benefit of a few at the expense of all, the limitations on advancement, here suggested as logically existing, may be found. If advancement from the general fund does not carry the necessity of a general levy to pay a deficiency, the problem may be over-emphasized. Nevertheless, repeated demands for payment out of the general fund creates an aggravating situation not conducive to the orderly process of government.

This court for determination of issues raised by petitioners, in compliance with Act No. 36 of the Public Acts of 1929, Section 13903-13905, Compiled Laws of 1929, offers this opinion. The availability of lots sold under Act No. 155 of Public Acts of 1937 as amended for a deficiency assessment under Act No. 331 of Public Acts of 1927 as amended must be viewed in the reflected light of Municipal Investors Association v. City of Birmingham supra. It was there held that the purchasers of bonds are assumed to [fol. 46] have purchased with knowledge that the lien for payment upon the properties securing the taxes and assessment may be discharged. A new chain of title originates free from any incumbrances. Anything is an incumbrance which constitutes a burden upon the title of property. The possibility of reassessment for the benefit is a liability held to constitute an incumbrance. A drain tax is a lien from the time there is an assessment for benefit. A warranty deed obligated the grantor to payment even though the tax could not have been paid at the time the deed was given. Lindsay v. Eastwood, 72 Mich., 333. It is here pointed out that Section 4939 of Compiled Laws of 1929 specifically states that payment in full of drain tax is a payment in full in light of possible reassessment. Reassessment must be predicated upon the basis of benefit.

This case is controlling. Lands sold under Act 155 of Public Acts of 1937 as amended are not subject to a deficiency reassessment. Under this holding, 65% of the lands in the district are lost to the possibility of reassessment.

The right to have a deficiency assessment spread against the remaining 35% of the lands in the district has not been presented sufficiently to justify a determination that would under all possible eventualities be applicable. The parties in interest in the district are not here represented. Many questions involving their rights have not been raised. At the time of hearing of objections as to the necessity of the project, the law contained no provision for a deficiency assessment, except as contained in Section 18, Chapter 10 of Act 316 of Public Acts of 1923 which omitted phraseology of Section 18 of Chapter 10 of Act 331 of Public Acts of 1927 providing for the levying of such an assessment due to the [fol. 47] failure to sell any lands for delinquent taxes. Such a provision was enacted in the interim between that time and the issuance of the bonds. This may have a material effect upon the rights of the parties. The regular special

assessment for the retirement of the bonds was not levied for a period of several years. The interest of those paying may have been prejudiced thereby effecting their reassessment obligation. Sums may have been lost through such inaction that would have otherwise been obtainable. The remedy of reassessment was not sought promptly upon the maturity of the bonds. A deficiency assessment upon the remainder of the property in the district which did not pass through the Scavenger Sale is contrary to all the established principles of uniformity and equality in assessment as guaranteed by the constitution as pointed out by the intervenor City of Royal Oak. "Special assessments or special taxation, therefore, is lawful and constitutional only when founded upon specific benefits accrued from the improvement for which the tax or assessment is laid. In other words, the test in all special taxation or assessment proceedings which is constantly invoked by the courts, is that the assessment should not exceed the special benefit to the property." McQuillin Municipal Corporations, 2nd Edition, Vol. 5, page 576. "Special Assessments shall not be levied in excess of the benefits conferred, whether by valuation, front foot area, or any other method. Norwood vs. Baker, 172 U. S. 269, 277, 288." "Obviously local assessment or special taxation laws cannot ignore constitutional restrictions or guarantees, as due process of law, equal protection of the law, or permit taking private property without just compensation." McQuillin Municipal Corporations, 2nd Edition, Section 2167. Such an assessment would be a tax having no relationship to benefit and is not valid special assessment levy.

[fol. 48] There should be funds available from lots sold and those that may be sold under Act No. 155 of Public Acts of 1937 as amended to materially alter and reduce the amount of the deficiency. It seems illogical to believe that lots in this section of the metropolitan area have sold and will be sold if the matter of sale is judiciously handled, for sums materially less than the determined beneficial improvement tax. It would seem that by legislative action or otherwise, application of funds so received should be to the retirement of the bonds. Other functions of government have succeeded in operation and application of a part of the proceeds thereto does not seem essential. They are most benefited by a return of the property to the tax rolls to support the present operation of government.

The provision for a deficiency assessment was enacted to cover a normal condition, not such an abnormal one as here presented. An attempt at reassessment on the basis of the percentage of benefit allocated to each parcel, if legally possible, with the exclusion of the exempted Scavenger Sale lots would not accomplish the retirement of the bonds. It would only accomplish confiscation of property. Any attempt at reassessment should at all events be predicated upon a determination that the same is not an idle act for it is well established legal axiom that courts will not order nor direct acts of this nature. Obviously for the reasons here enumerated it is determined, on the showing here made, that a deficiency assessment upon the remaining portion of the district omitting the area embraced in the lots sold under Act No. 155 of Public Acts of 1937 as amended may not be made.

George B. Hartrick, Circuit Judge.

Dated: December 16, 1942.

[fol. 49] In Circuit Court of Oakland County

Declaratory Judgment—Filed January 13, 1943

At a session of said court held this 13th day of January, 1943.

Present: Honorable George B. Hartrick, Circuit Judge.

This matter having come on to be heard upon petition and answer, testimony taken in open court and arguments of counsel, and the court having filed its opinion upon the matters of controversy, the court now makes the following declaration of right as between the parties hereto.

1. That respondents are not obliged by Section 18, Chapter X, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927, and Act 129 Michigan Public Acts 1939, to levy and spread, in accordance with the percentages in the original assessment roll of East Clawson Storm Sewer Drain against the governmental subdivision taxed at large therefor and against all lands in the district not owned by the United States, State of Michigan, or municipalities, and used by them for governmental purposes, an additional deficiency assessment sufficient when

collected to pay all outstanding bonds of said district and interest thereon.

2. That if refunding bonds and certificates of indebtedness are issued by East Clawson Storm Sewer Drain District, the Drain Commissioner will not be empowered under Act 129 Michigan Public Acts 1939 to provide, subject to the directions of the Public Debt Commission, for additional levies of assessments prior to the maturity of such [fol. 50] refunding bonds and certificates of indebtedness as he shall deem necessary to prevent default in payment of interest on such obligations and the maintenance of a sinking fund for their retirement.

3. That the provisions contained in paragraph 11 of the order of the Drain Commissioner dated April 9, 1942, copy of which is attached to the petition, may not lawfully be performed.

4. That lands in said Drain District which have been transferred to private owners by the State of Michigan by deed or contract made pursuant to Act 155 Michigan Public Acts 1937 are exempt from an additional deficiency assessment to meet requirements of bonds issued by said District.

5. The petition is, therefore, denied, but without costs, this being a public matter.

6. It is hereby certified that the amount involved in this controversy exceeds in value the sum of Five Hundred ($500.00) Dollars.

George B. Hartrick, Circuit Judge.

[fol. 51] In Circuit Court of Oakland County

Bill of Exceptions—Filed April 9, 1943

Appearances

This case came on to be heard October 23, 1942 upon petition and answer before Honorable George B. Hartrick, Circuit Judge (without a jury). Petitioners were represented by Irvin Long, their attorney, and respondents were represented by Harry J. Merritt, their attorney. Thereupon the following proceedings occurred.

Mr. W. C. Hudson, attorney for the City of Royal Oak, stated that his client had an interest in the subject matter of the suit and that he desired to intervene in its behalf for the purpose of submitting a brief. No objection was made to this by the original parties to the proceedings.

STATEMENT OF MR. LONG

Mr. Long stated petitioners' position as follows:

In order that the Court can understand the case without reading all the petition and the answer, I will go back and state some facts. The East Clawson Drain District was organized back in 1927 and in November, 1927, it issued bonds in the amount of $300,000, payable serially. They are all due now. There was litigation over this drain like many others and the Supreme Court in a case of East Clawson vs. Van Wagoner, decided that this was a legal drain and therefore an assessment would have to be levied. That was an action like so many others in which the village complained that this was a sewer and not a drain and therefore they should not have to pay the assessment. The Supreme Court decided that it was a legal drain.

The Court: Give me the citation of that case.

Mr. Long: I think it is 268 Michigan.

The Court: Never mind.

[fol. 52] Mr. Long: In this case there is no complaint or no argument over the legality of the drain but I will furnish you with that citation.

The Court: All right. Go ahead.

Mr. Long: For several years there was no annual levy of installments of the assessments. There was more or less negotiations between the bond holders committee and the Drain Commissioner, both Mr. Clark and Mr. Wedge but never arriving at any conclusion. Finally about a year ago, there was further negotiation and there was a tentative agreement which resulted in the entry of a new order by the Drain Commissioner for the refunding of these bonds. Now, there are $223,000.00 worth of bonds outstanding. I have prepared a little brief on the question which I will hand up to you, in which I erroneously stated there were $168,000. There is a plan which was agreed upon between the bondholders and the Drain Commissioner whereby they are to be refunded and the bonds at low rates of interest.

There is, however, a question of law involved in the case and which has to be tested because of the fact that it effects the amount that can be realized upon the new assessment that will have to be levied to service these bonds, and that is the question whether or not property which was in the district and which went to the Scavenger sale is now subject to a like assessment. Now, that does not involve the property which is still held by the State but only involves property that is now back in private hands so it is subject to general taxation for the village, township and county and so on and there is a difference between the two parties as to whether or not the Drain Commissioner is obliged to levy his assessment on those properties or whether he is forbidden by the law to levy such an assessment. It [fol. 53] seems to be conceded if he is empowered to levy a supplemental assessment on that type of property that the refunding plan would probably be susceptible of success. There will be enough monies derived from the property in the district and the municipalities so that they can pay the interest on these bonds and can pay off a reasonable amount at times over the long period involved, so ultimately the new bonds can be paid, but, on the other hand, if this property that has gone to the Scavenger sale is exempt from any further tax for these drain bonds, then this plan will probably not work out because there wouldn't be enough, from the other property in the district and the municipalities to support the refunding plan, so this action is started, rather with the consent of the parties because we wanted this thing decided. We have tried to eliminate all questions of fact in the case and have the particular legal proposition decided. It is an action under the declaratory judgment act and there were a lot of questions involved, but the principal one is the liability of this land that has gone to the Scavenger sale.

There is quite a voluminous statement of facts attached to the petition, a very carefully drawn order of the Drain Commissioner setting forth the plan of refunding and a very careful analysis of the drain district which was prepared by Mr. Carey, the refunding agent employed by the Drain Commissioner, in which the last exhibit shows somewhat the situation in the drain district. There were at large taxes against Oakland county and the township and village of Clawson, which amounted to 22½% of the total levy, that is 22½% of the cost of the drain was assessed at large. Of course, those at large assessments are against munic-

palities and the municipality can't go to the Scavenger sale. Then when it comes down to the district, it shows a [fol. 54] great deal of this property has gone to the Scavenger sale, so, as a result of Mr. Carey's total which was apparently true at the time the petition was filed, the amount which remains on the roll is the at large assessments of 22½%, the acreage assessments in the district of 8.4% and subdivisions in the district of 14.4%, showing that there is only 45% of the amount of the cost which is unaffected by this Scavenger proceeding. In other words, there is about 23% of the land in the district which have gone to the Scavenger sale. Some of those lands, the taxes have been paid in full, that is the original levies and there is then about—there is land in the district amounting to about 55% of the total cost of the drain. We don't mean there is 55% in area, we mean 55% of the amount originally assessed, has gone to the Scavenger sale and of course, if that land is exempt from further tax, it will mean that the whole cost of these bonds will have to be borne by the municipality at large and by this small percentage of land where the taxes have either been paid in full or where they are being paid from time to time and where there hasn't been that procedure through the Scavenger sale. I wonder if I make myself clear?

The Court: Yes. The only thing I want to ask, whether the Scavenger sale has any representative in Court who might want to urge their position.

Mr. Merritt: My position will support that, your Honor.

The Court: In other words, Mr. Merritt, you are going to take the position of presenting to the Court any authority supporting the Scavenger sale?

Mr. Merritt: Yes, because I think that is essential.

Mr. Long: I presume Mr. Hudson will also present that. [fol. 55] Mr. Hudson: I am not sure what my position will be only I am sure it will be that the city's assessment should not be increased.

The Court: You are going to take the position whether or not the Scavenger lot owners are subject to reassessment that they must not pass as further invasion of the city's general liabilities.

Mr. Hudson: That is correct.

Mr. Long: Now, as to whether there is any need of any further testimony, I don't doubt but what Mr. Merritt wants to present merely the situation on the roll at the

present time. It seems to me we are just adding to the extent of the record and making it more expensive for an appeal, to go into that. The exhibits prepared by Mr. Carey were true at the time when the petition was filed. I presume there has been some land that has been brought back from the state and now in private hands and there may be some slight change but as far as legal principles are concerned, it doesn't make any difference whether these figures are exactly accurate or not, whether it is 45% or 47% or what it is. There is no question but what there is a large area of land in that district which has gone to the Scavenger sale. There is no question but what there are a good many of these lots which are still in the hands of the State and which cannot be assessed and there will probably be a number of those parcels which will get back in private hands because we know that is going on all the time.

The Court: Mr. Long is simply saying Mr. Carey's exhibit is sufficient for the legal determination of the issue.

Mr. Long: Yes.

Mr. Merritt: That is partly right but I think the exhibit we have will enable the Court to see the picture much more clearly.

[fol. 56] The Court: I have no objection to having you put it in.

STATEMENT OF MR. MERRITT

Mr. Merritt: If I may make a preliminary statement. Mr. Long has partially stated the questions involved here and perhaps there are other questions that I feel are involved and desire to call to the Court's attention. In other words, he stated that the question here was the liability of lands which have gone through the Scavenger sale. Now, I think there are two other questions, what is the liability of the remaining lands which have not gone through the Scavenger sale and third, what is the liability of the county to advance, depending on the conclusion of the former questions.

I would like to further state that it has never at any time been the position of Oakland County to repudiate its indebtedness and when I say Oakland County, I include this drain district but as Mr. Long stated, this question remains as an obstacle to any refunding and the matter had to be brought to the Court so we would know what property to assess and what not to assess.

CLARK, EARL L., a witness for respondents, was then sworn and testified as follows:

I am Drain Commissioner of Oakland County and have custody of the record of the Drain Office. I have with me the assessment roll of the East Clawson Storm Sewer Drain District. It is in a book which contains the assessment roll on the district.

(The book containing the assessment roll was ordered considered as Exhibit 1 and received in evidence.)

[fol. 57] EVANS, ROBERT JOHN, a witness for respondents, was then sworn and testified as follows:

Direct examination:

I am employed in the office of the Oakland County Drain Commissioner.

Q. What is your full name, please?

A. Robert John Evans.

Q. Are you employed in the office of the Oakland County Drain Commissioner?

A. I am.

Q. Will you state whether or not you made a summary roll from the assessment rolls of the East Clawson Drain District showing the original district, the percentage of lands that had gone through the Scavenger sale and were either still owned by the State or had passed on to private individuals and the remaining district?

A. You mean did I make a percentage of that?

Q. Did you make the map you have in your hand?

A. I made a map showing the status of that drain district. The map was marked Exhibit 2.

The line of the district is outlined in the map in green. Portions of the map marked in red are properties which went to Scavenger sale. Portions marked in blue are properties on which the drain assessments have been paid in full. The remaining portion in white represents property remaining on the rolls of the East Clawson Storm Sewer Drain. The yellow lines represent streets and alleys. I prepared Exhibit 2 from the assessment rolls. It shows the status of the district up to last Friday.

(Exhibit 2 received in evidence.)

[fols. 58-61] I do not know whether those portions marked in red are owned by the State or have gone back to private hands. As far as I know some of them may be in the hands of private owners. My search was terminated when I saw that a parcel of property went into the Scavenger sale. I do not know whether at the Scavenger sale it was sold by the State to the former owner or to an outsider, or whether held by the State. We haven't any record of that in our office.

Mr. Merritt: We admit portions of it undoubtedly have been sold to private persons, your Honor, how much, we don't know.

Q. How could that be determined?

A. Through the County Treasurer's office only, I think.

(The testimony being concluded, the issues were argued both orally and by briefs and on December 16, 1942, the court filed its opinion which appears of record, upon which judgment was entered denying the petition.)

[fol. 62] IN THE SUPREME COURT OF MICHIGAN

KENNETH M. KEEFE and WALLACE D. BRADFORD, Petitioners-Appellants,

v.

EARL L. CLARK, Drain Commissioner of Oakland County, and Board of Supervisors of Oakland County, Respondents-Appellees

Before the Entire Bench

OPINION—Filed October 11, 1943

BUSHNELL, J.:

Petitioners Keefe and Bradford have appealed from a declaratory judgment which determined that respondents, Drain Commissioner and Board of Supervisors of Oakland county, are not obligated, by § 18, chapter X of Act No. 316, Pub. Acts 1923, as amended by Act No. 331, Pub. Acts 1927, and Act No. 129, Pub. Acts 1939, 1 Comp. Laws 1929, § 4940

(Stat. Ann. § 11.104), to levy an additional assessment to cover the deficiency in a drain tax. Petitioners are the owners of bonds, which are a part of an original issue in 1927, of $300,000, to finance the construction of the East Clawson Storm Sewer Drain.

This improvement was held to be a legal drain and the assessment, therefore, valid in Village of Clawson v. Van Wagoner, 268 Mich. 148. The original assessment roll was payable in annual installments from 1928 to 1937, inclusive, and was levied as follows: 77.5 per cent against lands in the drainage district; 3.5 per cent against the county at large; 2.5 per cent against Township of Troy; [fol. 63] 6.5 per cent against the Township of Royal Oak; and 10 per cent against the Village of Clawson. All of the bonds had matured by May 1, 1938, and as of December 31, 1941, $33,440 was due for interest and $223,000 for principal.

The assessment installments were levied for four years from 1927 to 1931, and then discontinued. In 1937, in contemplation of a refunding arrangement, a supplemental roll was prepared spreading the remaining six installments of principal over a period extending from 1937 to 1961, and the accumulated interest over a ten year period. The failure to levy after 1931 was due to a large tax delinquency. During 1939 and 1940 about 47 per cent of the lands in the district were bid in by the State at tax sales. How much of these lands have since been returned to private ownership is not disclosed by the record. Before negotiations between the bondholders and the drain commissioner were consummated, the case of Municipal Investors Association v. City of Birmingham, 298 Mich. 314, was decided on June 30, 1941. Respondents contended that this decision was authority for the proposition that lands in the drainage district which passed through a "scavenger sale" became exempt from any deficiency assessment for unpaid drain taxes. The parties held the refunding plan in abeyance pending decision of the Supreme Court of the United States in the Birmingham appeal, which decision was rendered on April 27, 1942, and reported in 316 U. S. 153, 62 S. Ct. 975, 86 Law Ed. 1341. This case was commenced June 25, 1942.

Petitioners in the instant case argue that the action of the Supreme Court of the United States in the Birmingham case was inconclusive of their rights, and that it became

necessary for them to resort to declaratory judgment proceedings in the state courts. The circuit judge held that our decision in the Birmingham case was conclusive of the issues involved, and that lands sold by the State Land Office [fol. 64] Board, under the provisions of Act No. 155, Pub. Acts 1937, Mason's Cum. Supp. 1940, § 3723-1 et seq. (Stat. Ann. § 7.951 et seq.), were not subject to a deficiency assessment, and since a large portion of the lands in the district were lost to the possibility of reassessment, a deficiency assessment upon the remaining lands which had not been sold for delinquent taxes was "contrary to all the established principles of uniformity and equality in assessment as guaranteed by the Constitution," in that such an assessment "would be a tax having no relationship to benefit."

Appellants now argue that lands which have been sold to the State for delinquent taxes are not exempt from the deficiency assessment after their resale by the State, and that, if the act in question provides for such an exemption, it is in violation of section 9 of article X of the Constitution of 1908, which reads:

"The power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any municipal corporation shall be a party."

They also contend that, if the act is construed to exempt such lands from deficiency assessments, it does so in violation of the impairment of obligation clauses of the State and Federal Constitutions. They further contend that, even if such lands are exempt, the remaining lands and the municipalities against which the original assessment was spread at large are still subject to an additional tax for the purpose of retiring the unpaid drain bonds.

The section of the General Drain Law, upon which petitioners rely, reads in part:

"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, [fol. 65] whether such insufficiency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore

provided in such an amount as will make up the deficiency." 1 Comp. Laws 1929, § 4940, as amended by Act No. 129, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 4940, Stat. Ann. 1942, Cum. Supp. § 11.104).

The general drain law must be read and construed together with the general property tax law of the State for the reason that:

"All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. * * *." General drain law (chap. 10, § 5, 1 Comp. Laws 1929, § 4927 (Stat. Ann. § 11.91)).

The general property tax law, § 67, 1 Comp. Laws 1929, § 3459, as last amended by Act No. 234, Pub. Acts 1941 (Comp. Laws 1942, § 3459, Stat. Ann. 1942 Cum. Supp. § 7.112), provides that the final decree for the sale of lands assessed shall contain, among other provisions, the following:

"It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes, special assessments, which are charged against or are liens upon such parcel, and other liens and encumbrances, against such parcel, of whatever kind or nature, shall be cancelled as of such date."

The law further provides in the State Land Office Board Act (Act No. 155, § 9, Pub. Acts 1937, as amended by Act No. 363, Pub. Acts 1941 [Comp. Laws Supp. 1943, § 3723-9], Stat. Ann. 1942 Cum. Supp. § 7.959):

"Any quitclaim deed or deeds executed by the board or department shall convey title in fee to land under the provisions of this act, free from any encumbrances, including all taxes and special assessments which were cancelled by the decree pursuant to which the state obtained title."

The latter act was discussed in Municipal Investors Association v. City of Birmingham, 298 Mich. 314, and those members of the court who concurred in the opinion of Mr. Justice Sharpe held that "anything is an incumbrance which constitutes a burden upon the title," and that "it [fol. 66] would naturally follow that the possibility of reassessment would constitute an incumbrance and thus be cancelled."

Appellants argue that the Birmingham case may be distinguished on its facts and is not conclusive of the issues involved in the instant appeal because the legislature, by its amendment to §67 of Act No. 206, Pub. Acts 1893, (1 Comp. Laws 1929, §3459, Stat. Ann. §7.112), effective June 16, 1941, indicated that only those "special assessments which are charged against or are liens upon such parcel," are to be cancelled, and not deficiency assessments which never had been charged against the land, and were not, therefore, liens at the time of sale. We are unable to agree with this argument. The decree of sale provided, as required by statute, that "other liens and incumbrances against such parcel of whatever kind or nature shall be cancelled as of such date." Our Birmingham decision is authority for the proposition that the possibility of reassessment would constitute an incumbrance, and is, therefore, cancelled.

In considering appellants' argument with respect to the impairment to the obligations of the contract, it is important that the underlying causes leading to the legislation, which appellants now attack, be fully comprehended and understood.

We need not repeat the history of this legislation, which is detailed in Baker v. State Land Office Board, 294 Mich. 587,592 et seq., and which is quoted in our Birmingham decision. The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision.

The statute, Act No. 155, §10, Pub. Acts 1937, as amended by Act No. 363, Pub. Acts 1941. (Comp. Laws Supp. 1942, §3723-10, Stat. Ann. 1942 Cum. Supp. §7.960), provides that, after the sale of property by the State Land Office Board, each tax assessing unit shall be paid its pro rata share of the proceeds of the sale. The bondholders' maximum security was thus realized after the tax lien was foreclosed when the subsequent sale of the property was consummated. [fol. 67] Were it not for this act, under the then existing

circumstances, the lands would have been rendered valueless for further revenue purposes because of accumulated delinquent taxes, and the bondholders would have realized nothing from their lien. We cannot, therefore, say that the bondholders' contract has been impaired when they received the maximum benefit under the circumstances. As said by the Supreme Court of the United States in the Birmingham appeal:

"If the stated powers of the Village to levy an assessment on improvement district property required that the lots assessed, after sale for default in their installments, should be subject to an additional assessment to cover such deficiencies, the burden might depress their value to a point where little if anything could be realized for the bondholders, and successful sales for nonpayment would be frustrated. This would clearly be true where, as here, a very large proportion of the assessment were defaulted."

To this we add the observation that, if the lands were again subject to a deficiency assessment, after sale to the State and conveyance by it to a third party, the possibility of the restoration of this property to the tax rolls would be considerably lessened because prospective buyers might well hesitate to assume such an obligation.

The rule that existing laws are read into contracts, in order to establish the obligations between the parties, is subject, however, to the well-known reservation of the essential attributes of the sovereign power, and this reservation must also be read into contracts as a postulate of the legal order. Baker v. State Land Office Board, 294 Mich. 587. As stated by the Chief Justice in Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 437, 78 Law Ed. 413, 428:

"The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

The act does not, as appellants argue, surrender the tax-[fol. 68] ing power as prohibited by section 9 of article X of the Michigan Constitution, because the lands in question are subject, from the time that the purchaser's bid is accepted by the State Land Office Board, to all taxes, other than those extinguished by the tax sale. Wilson v. City of Pontiac, 294 Mich. 79. That portion of the act cancelling taxes is a

valid exercise of the police power. The State's immunity from taxation on the lands while held by it is in no way passed on to the subsequent individual purchaser of these lands from the State.

Appellants contend that, if it be held that the deficiency assessment cannot be levied against lands purchased from the State, that it can, nevertheless, be levied against those lands which have not been sold for delinquent taxes and against those municipal units against which a proportion of the original assessment had been spread at large.

The trial judge determined that such assessment would violate the uniformity clause of the Constitution. If the entire amount of the deficiency assessment were spread against such lands and taxing units, the argument would be logical and sound. However, it is only fair and reasonable that such lands and municipalities continue to bear their just proportion of the cost of improvement originally imposed. The act does not cancel incumbrances on lands that have not been sold for delinquent taxes nor those portions of the special assessments which were spread at large against the several municipalities.

A deficiency assessment should be spread and there should be deducted from 77.5 per cent. of the total deficiency that portion which would have been applicable to lands in which the State acquired absolute title under delinquent tax sales, and the remainder of the 77.5 per cent. should be spread against lands not sold under that act. 22.5 per cent of the deficiency assessment should be spread as follows: [fol. 69] 3.5 per cent against the county at large, 2.5 per cent against the Township of Troy, 6.5 per cent against the Township of Royal Oak, and 10 per cent against the Village of Clawson.

This determination is in accord with the general principle stated by Mr. Justice Holmes in Gast Realty & Investment Co. v. Schneider Granite Company, 240 U. S. 54, 60 Law Ed. 522

"The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. * * * But * * * if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties

will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The declaratory judgment entered in the circuit court is modified and affirmed, and the cause is remanded for the entry of a judgment in conformity with this opinion. The question being a public one, no costs will be allowed. It is so ordered.

Signed: George E. Bushnell, Edward M. Sharpe, Henry M. Butzel, Raymond W. Starr, Emerson R. Boyles, Walter H. North, Howard Wiest.

[File endorsement omitted.]

[fol. 70] IN SUPREME COURT OF MICHIGAN

42415

KENNETH M. KEEFE AND WALLACE D. BRADFORD, Plaintiffs and Appellants,

vs.

EARL L. CLARK, Drain Commissioner of Oakland County, and Board of Supervisors of Oakland County, Defendants.

JUDGMENT—October 11, 1943

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Oakland, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is no error, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Oakland be and the same is hereby in all things modified and affirmed, and the cause remanded to the Court below for the entry of a judgment in conformity with the opinion filed herein. It is further ordered that no costs be awarded herein.

[fol. 71] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF MICHIGAN TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Stanley Reed, Associate Justice of the Supreme Court:

Your petitioners, Kenneth M. Keefe and Wallace D. Bradford, citizens of the State of New York, respectfully show:

I

That they are petitioners and appellants in the above entitled cause.

II

Petitioners and appellants, on June 25, 1942, instituted this suit in the Circuit Court for the County of Oakland by filing a petition for a declaratory judgment, that form of action being authorized by Sections 13903 to 13909, Michigan Compiled Laws. In said petition they alleged that they are holders of bonds of the par value of $32,000.00, constituting a part of an issue of $[illegible]00,000.00, of which there remained unpaid $223,000.00, with some defaulted interest, put out November 1, 1927 by East Clawson Storm Sewer Drain District, a drain district within the said County of Oakland. They showed that all bonds of said issue had matured and were unpaid because collections of assessments levied for the building of the drain known as East Clawson Storm Sewer Drain had not been collected. They invoked [fol. 72] a statute of said State of Michigan in force at the time the said bonds were issued, which had not been repealed, which required that the respondents under such circumstances should levy and spread an additional deficiency assessment against lands in the district and certain municipal corporations sufficient to retire said bonds and discharge the accumulated interest thereon. According to said statute such additional assessment should be levied in accordance with percentages previously fixed in the proceedings by which the cost of the drain was apportioned against the lands and municipalities benefited. Said statute is Section 18, Chapter X, Act 316, Michigan Public Acts of 1923, amended by Act 331, Michigan Public Acts of 1927, and

again amended by Act 129, Michigan Public Acts of 1939, the pertinent provision of which may be found in Section 4940, Michigan Compiled Laws of 1929. Petitioners further showed that respondents, whose duty it was to make said levy and cause it to be spread and collected, had refused to act, on the ground that certain statutes of the State of Michigan enacted in 1937, with subsequent amendments thereto which are more particularly described in paragraph V hereof, and action taken pursuant thereto, deprived them of the power to make any additional deficiency assessment sufficient for the payment of said outstanding bonds and interest thereon. Petitioners, while denying the correctness of the respondents' interpretation of said statute, charged in paragraph 5 of their petition that if the statutes enacted in 1937 were to be interpreted as contended by respondents, they were repugnant to Article I, Section 10, of the Constitution of the United States, in that they impaired the obligation of contracts embodied in said bonds by depriving petitioners of all effective means for the enforcement of their bonds. By respondents' answer they asserted the contention that said statutes enacted in 1937 deprived them of the power to levy and spread such deficiency assessment, and denied that any provision of the Constitution of the United States was violated thereby. The Circuit Court for the County of Oakland upheld the contention of respondents and entered a judgment denying the petition, and declared therein that no additional deficiency assessment could be levied.

[fol. 73]

III

Petitioners duly appealed from said judgment to the Supreme Court of the State of Michigan, the highest court in the State of Michigan in which a decision in said suit could be had. In said appeal petitioners claimed that the judgment of the lower court was erroneous in that it held that no additional deficiency assessment could be levied.

IV

On October 11, 1943 the Supreme Court of the State of Michigan rendered an opinion appearing in Volume 306, page 503, Michigan Reports, and its final judgment in said cause, by which the judgment of the said Circuit Court for the County of Oakland was to some extent modified, and

the cause was remanded to said Circuit Court for the purpose of entering a judgment in accordance with the directions contained in said opinion and judgment of the Supreme Court of said state. It was there decided that a deficiency assessment should be levied and spread, but only against the municipalities and certain lands in the drain district, and as against such municipalities and such lands only for the proportion which the original assessment against them bore to the deficiency, and that those lands in the district which by reason of tax delinquency had passed to the state and had been resold, pursuant to the statutes enacted in 1937 described in paragraph V hereof, and were now privately owned, were exempt from any further assessment to pay the debt of said district as represented by the said bonds. By virtue of said judgment petitioners are thus deprived of substantial resources for the payment of their bonds. In arriving at its conclusion said Supreme Court of the State of Michigan considered and rejected the claim of petitioners that the said statutes enacted in 1937, with amendments thereto, as they were construed by the court, impaired the obligation of their contracts contrary to the provisions of Article I, Section 10, of the Constitution of the United States.

V

That in said cause there was drawn in question the validity of the following statutes of the State of Michigan:

[fol. 74] (a) Act 114 of the Michigan Public Acts of 1937, as amended by Act 282, Michigan Public Acts of 1939, and Act 234, Michigan Public Acts 1941.

(b) Act 155 of the Michigan Public Acts of 1937, as amended by Acts 29, 244 and 329 of Michigan Public Acts 1939, and Act 363 of Michigan Public Acts of 1941,

insofar as said statutes limit the right of petitioners to a full deficiency assessment for the payment of their bonds and interest thereon, and the spread of same against municipalities subject to an at large tax for said drain and all lands in the drain district otherwise taxable, on the ground that said statutes are repugnant to the Constitution of the United States. The decision of the Supreme Court of Michigan was in favor of the validity of said statutes, notwithstanding petitioners' contention to the contrary.

VI

That the judgment and decision of said court was erroneous in sustaining the validity of the aforesaid acts, said acts being in violation of that part of Section 10, Article I, of the Constitution of the United States which provides that "No state shall * * * pass * * * any law impairing the obligation of contract."

VII

That the errors upon which petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors filed herewith. There is also filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by the rules of said court.

Wherefore, petitioners pray for the allowance of an appeal from said Supreme Court of the State of Michigan, that the decision of the Supreme Court of the State of Michigan may be examined, revised and corrected, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Michigan, be sent to the Supreme Court of the United States, as provided by law.

Paul W. Voorhies, Voorhies, Long, Ryan & McNair, Attorneys for Petitioners and Proposed Appellants. Business Address: 2046 Penobscot Building, Detroit, Michigan.

Dated: Dec. 16, 1943.

[fol. 75] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The said Kenneth M. Keefe and Wallace D. Bradford, petitioners and appellants, say that the Supreme Court of the State of Michigan, in considering and construing statutes of the State of Michigan enacted in the year 1937, with amendments thereto, more particularly described as follows (which hereinafter for the purpose of brevity will be referred to as the statutes of 1937,) to-wit:

Act No. 114 of the Michigan Public Acts of 1937, as amended by Act No. 282 of the Michigan Public Acts

of 1939, and further amended by Act No. 234, Michigan Public Acts of 1941, (Compiled Laws of Michigan 1942, Article 3459, Michigan Statutes Annotated 1942, Cum. Supp., Article 7.112,) and also Act No. 155 of Michigan Public Acts 1937, as amended by Acts 29, 244 and 329 of Michigan Public Acts of 1939, and further amended by Act No. 363, Michigan Public Acts 1941 (Compiled Laws of Michigan Supplement 1943, Article 3723-9, Michigan Statutes Annotated 1942, Cum. Supp. Article 7-959),

committed error in the following respects:

1. It erred in denying the claim of petitioners and appellants that said statutes, as it construed them, are repugnant to Article I, Section 10, of the Constitution of the United States, in that they permit the exemption of lands in a drain district from an additional deficiency levy of assessments for the purpose of paying bonds, and thus deprive holders of such bonds of substantial resources, out of which payment of said bonds can be enforced, which resources were secured to them by laws in force when said bonds were issued.

[fol. 76] 2. It erred in denying the claim of petitioners and appellants that said statutes, as it construed them, are repugnant to Article I, Section 10, of the Constitution of the United States, in that they limit the amount which may be assessed against municipalities and lands not exempted to sums insufficient to provide funds for the retirement of bonds contrary to provisions of law in force when said bonds were issued.

3. It erred in holding that Article I, Section 10, of the Constitution of the United States does not forbid the passage of laws which so curtail the power of public agencies to levy taxes for the discharge of their debts that creditors of such agencies are left without means of enforcing obligations held by them.

4. It erred in holding that laws in force at the time of the issuance of bonds by public agencies, providing for the levy of taxes for the discharge of their obligations, do not remain in force by virtue of Article I, Section 10, of the Constitution of the United States, for the purpose of en-

abling the holders of said obligations to secure funds for their payment.

5. It erred in holding that the sovereign power of the state to enact tax laws is not restricted by Article I, Section 10, of the Constitution of the United States, and that thereby an alteration of the laws in force at the time a bonded debt of a public agency is created, which materially reduces the resources of such agency for the payment of such debt, is not an impairment of the obligation of contract.

6. It erred in entering a judgment October 11, 1943, which remands the case to the Circuit Court for the County of Oakland, with directions to enter a judgment denying to petitioners pre-existing rights to a full deficiency assessment against all lands in the district otherwise taxable, and against the governmental units subject to an at large tax for the East Clawson Storm Sewer Drain, in that such direction impairs the obligation of petitioners' pre-existing contract contrary to the provisions of Article I, Section 10, of the Constitution of the United States.

[fol. 77] For which errors appellants pray that the judgment of the Supreme Court of the State of Michigan, entered in said cause on the 11th day of October, 1943, be reversed and a judgment entered in favor of petitioners, and that said cause be remanded to the Supreme Court of the State of Michigan for such additional action by said court as may be necessary in order that appellants may have the relief prayed in their petition for a declaratory judgment.

Paul W. Voorhies, Voorhies, Long, Ryan & McNair, Attorneys for Petitioners & Appellants, 2046 Penobscot Building, Detroit, Michigan.

Dated: Dec. 16, 1943.

[fol. 78] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER OF CHIEF JUSTICE OF THE SUPREME COURT OF MICHIGAN DENYING APPLICATION FOR APPEAL TO SUPREME COURT OF THE UNITED STATES—December 9, 1943

The appellants having presented to me their application for appeal to the Supreme Court of the United States from the judgment of this court entered October 11, 1943 in this cause, which application was accompanied by appellants' assignment of errors and statement of jurisdiction, the said application is hereby denied.

Emerson R. Boyles, Chief Justice of the Supreme Court of Michigan.

Dated: December 9, 1943.

[fols. 79-87] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—December 16, 1943

The petition of Kenneth M. Keefe and Wallace D. Bradford, appellants in the above entitled cause, for an appeal in said cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Michigan, together with the assignment of errors and the statement of jurisdiction, have been presented to the undersigned, and the records in this cause having been considered,

It Is Hereby Ordered that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the final judgment in said cause, dated the 11th day of October, 1943, of the Supreme Court of Michigan, as prayed in said petition, and the Clerk of the Supreme Court of Michigan shall within forty (40) days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties, or their counsel herein.

It Is Further Ordered that the said appellants shall give a good and sufficient bond in the sum of Five Hundred ($500.00) Dollars; that said appellants shall prosecute said appeal to effect and answer all costs if they fail to make their plea good.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated: December 16th, 1943.

[fol. 88] IN SUPREME COURT OF MICHIGAN

PLAINTIFF'S IN ERROR STATEMENT OF QUESTIONS INVOLVED

1. When lands in a drain district have passed through a scavenger sale under Act 155, Public Acts 1937, as amended, and are again privately owned, are they exempt from additional deficiency drain taxes provided under Act 129, Public Acts 1939?

The lower court said "Yes."
Appellants contend answer should be "No."

2. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article X, Section 9, of the State Constitution?

The lower court impliedly said "No."
Appellants contend answer should be "Yes."

3. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article I, Section 10, of the Federal Constitution, and Article II, Section 9, of the State Constitution?

The court impliedly said "No."
Appellants contend answer should be "Yes."

4. Do municipalities, against which an at large tax is spread, and lands which have not passed through a scavenger sale, become exempt from a deficiency levy under Act 129, Public Acts 1939?

The court said "Yes."
Appellants contend answer should be "No."

[fols. 89-90] IN SUPREME COURT OF MICHIGAN

DEFENDANT'S IN ERROR ARGUMENT

Appellees accept the issues as framed in the "Statement of Questions Involved" appearing on page i of Appellants' Brief. Appellees will answer these four questions in the order in which they appear on page i, although Appellants apparently combine the first three questions under the heading "I," pages 6 and 7, Appellants' Brief.

• • • • • • •

(Here follows 1 photolithograph, side folio 91-94)

[fol. 95] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD TO BE PRINTED—Filed February 2, 1944

Kenneth M. Keefe and Wallace D. Bradford, petitioners and appellants in the above entitled cause, pursuant to Paragraph 9 of Rule 13 of the Revised Rules of this Court, adopt their assignments of error as their statement of the points on which they intend to rely.

They designate the following parts of the record as necessary for the consideration of said points:

1. Printed record as filed in the Supreme Court of Michigan, except that the following should be omitted therefrom:

(a) Index.
(b) Title page.
(c) Names of attorneys and vertification on page 10.
(d) Portions of pages 16 and 17 between "Letter Of Transmittal" and "Submit In Duplicate With Bonds".
(e) Portions of pages 18 and 19, after first paragraph on page 18 and second paragraph on page 19.
(f) Inserted exhibits between pages 36 and 37.
(g) Portion of page 58 entitled "Certificate of the Court" and page 59.

[fol. 96] 2. Order of Chief Justice of Supreme Court of Michigan denying application for appeal to Supreme Court of United States, except title and certificate.

3. Petition for appeal from the Supreme Court of Michigan to the Supreme Court of the United States.

4. Assignments of error.

5. Judgment of Supreme Court of Michigan dated October 11, 1943, except caption and certificate.

6. Opinion of Supreme Court of Michigan.

7. Opinion of Circuit Court for County of Oakland.

Dated: January 27, 1944.

Paul W. Voorhies, Irvin Long, Counsel for Petitioners and Appellants. Business Address: 2046 Penobscot Building, Detroit, Michigan.

[fol. 97] SUPREME COURT OF THE UNITED STATES

[Title omitted]

COUNTER-DESIGNATION OF RECORD TO BE PRINTED—Filed March 1, 1944

Earl L. Clark, Drain Commissioner, Board of Supervisors of Oakland County and the City of Royal Oak, appellees and intervened appellees designate the following parts of the record in addition to those designated by appellants:

(1) That part of appellants brief in the Michigan Supreme Court entitled "Statement of Questions Involved";

(2) That part of appellees brief under the heading "Argument" page 3, which reads as follows: "Appellees accept the issues as framed in the "Statement of Questions Involved" appearing on page (I) of appellants brief;

(3) Defendants' Exhibit 2.

Harry J. Merritt, Attorney for Clark and Board of Supervisors. Business Address: County Office Building, Pontiac, Michigan. William C. Hudson, Attorney for City of Royal Oak, City Hall, Royal Oak, Michigan.

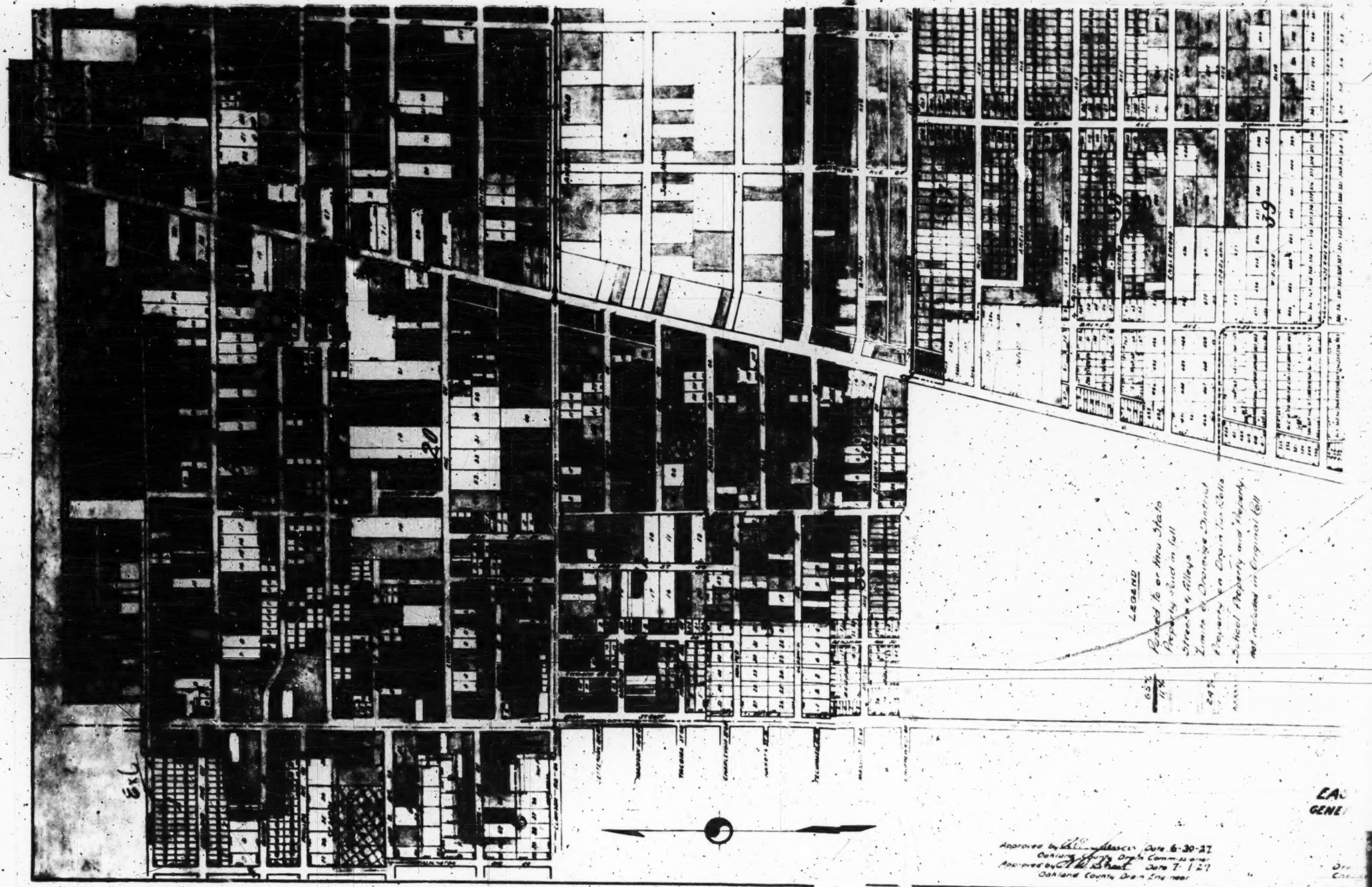
[fol. 98] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

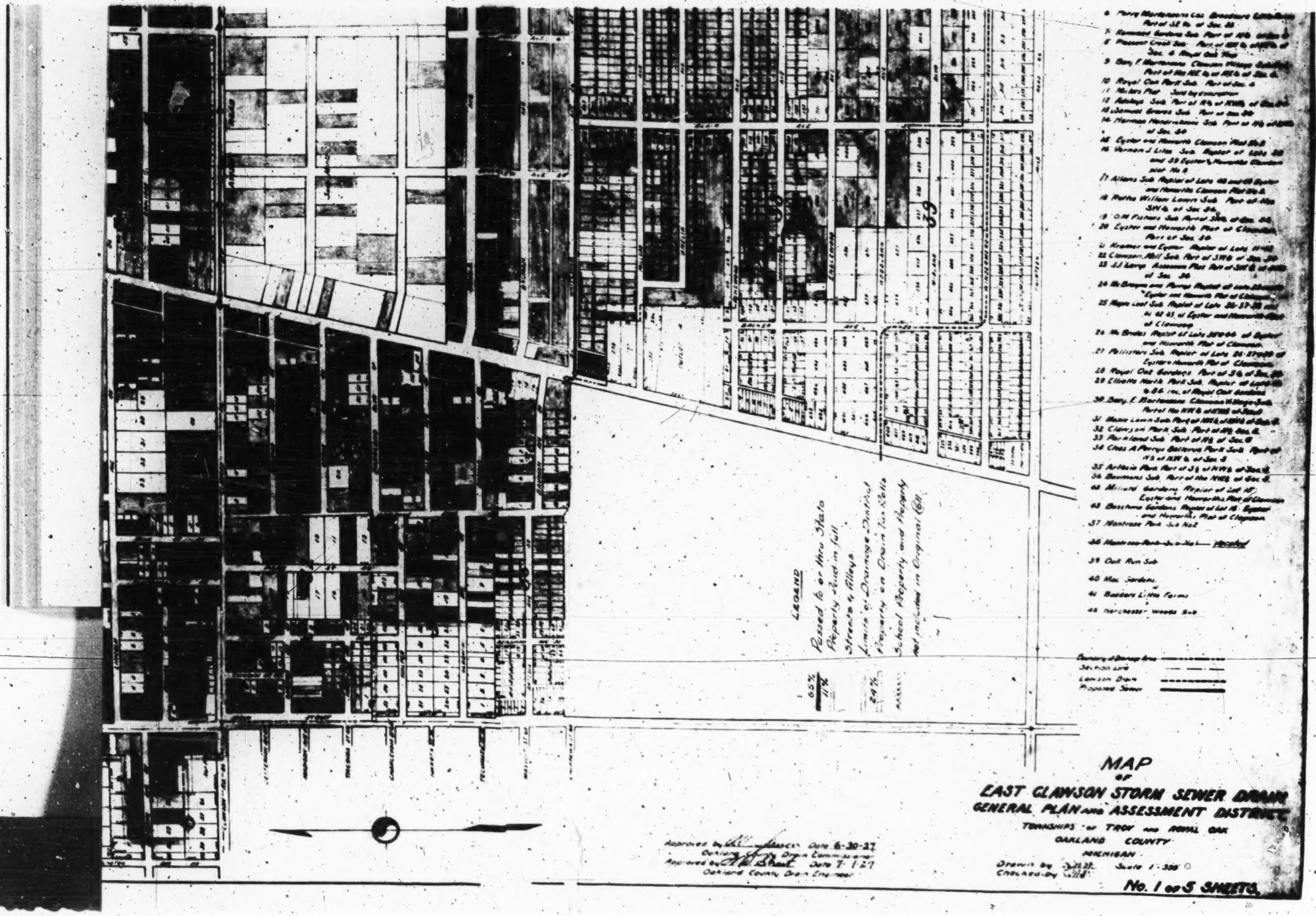
No. 634

ORDER NOTING PROBABLE JURISDICTION—February 28, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 48,127, Michigan Supreme Court, Term No. 634. Kenneth M. Keefe and Wallace D. Bradford, Appellants, vs. Earl L. Clark, Drain Commissioner of Oakland County, Michigan, and Board of Supervisors of Oakland County, City of Royal Oak, Intervenor. Filed January 26, 1944. Term No. 634, O. T. 1943.


LEGEND
Roads 16 or less Wide
Property Sold in Full
Streets & Alleys
Limits of Drainage District
Property in Drainage District
School Property and Property not included in Original Plat
Approved by [illegible] Date 6-30-27
Oakland County Drain Commissioner
Approved by C. E. Shaul Date 7-1-27
Oakland County Drain Engineer



6 Percy Montgomery Est. Broadmoor Estates Part of SE ¼ of Sec. 33
7 Normandy Gardens Sub. Part of NW ¼ of Sec. 4
8 Pleasant Creek Sub. Part of NW ¼ of NE ¼ of Sec. 4, Royal Oak Twp.
9 Percy F. Montgomery Clawson Village Subdivision Part of the NE ¼ & of NW ¼ of Sec. 4
10 Royal Oak Park Sub. Part of Sec. 4
11 Walters Plat. Sold by description
12 Ashley Sub. Part of E ½ of NW ¼ of Sec. 34
13 Samuel Graves Sub. Part of Sec. 28
14 Norman Hendrickson Sub. Part of W ½ of NW ¼ of Sec. 34
15 Oyster and Howarth Clawson Plat No. 2
16 Vernon J. Liles Sub. Replat of Lots 38 and 39 Oyster & Howarths Clawson plat No. 2
17 Allens Sub. Replat of Lots 40 and 41 Oyster and Howarths Clawson Plat No. 2.
18 Martha Wilson Lawns Sub. Part of the SW ¼ of Sec. 34.
19 O.M. Fishers Sub. Part of S½ of Sec. 34.
20 Oyster and Howarths Plat of Clawson, Part of Sec. 34
21 Kramer and Oyster. Replat of Lots 41-42
22 Clawson Mill Sub. Part of S½ of Sec. 34
23 J.J. Longs Assessors Plat. Part of S½ of NW ¼ of Sec. 36
24 Mr. Brooks and Percys Replat of Lots 38 Oyster and Howarths Plat of Clawson
25 Maple Leaf Sub. Replat of Lots 36-37-38 and N. 42 43 of Oyster and Howarths Plat of Clawson
26 Mr. Brooks Replat of Lots 39-40-41 of Oyster and Howarths Plat of Clawson.
27 Pollisters Sub. Replat of Lots 36-37-38-39 of Oyster Howarths Plat of Clawson.
28 Royal Oak Gardens. Part of S ½ of Sec. 33
29 Elliotts North Park Sub. Replat of Lots 4-5-6 inc. of Royal Oak Gardens
30 Percy F. Montgomery Clawson Village Sub. Part of the NW ¼ of NE ¼ of Sec. 4
31 Maple Lawn Sub. Part of NE ¼ of NW ¼ of Sec. 4
32 Clawson Park Sub. Part of NE ¼ Sec. 4
33 Park Land Sub. Part of N ½ of Sec. 3
34 Chas. A. Percys Baldwins Park Sub. Part of N ½ of NW ¼ of Sec. 3
35 Archdale Park. Part of S ½ of NW ¼ of Sec. 4
36 Baumans Sub. Part of the NW ¼ of Sec. 4
37 Mildred Gardens. Replat of Lot 47 Oyster and Howarths Plat of Clawson
38 Beechtree Gardens. Replat of Lot 48 Oyster and Howarths Plat of Clawson
39 Montrose Park Sub No. 2
40 Montrose Park Sub No. 1 Vacated
41 Oak Run Sub
42 Mac Gardens
43 Baldwins Little Farms
44 Norchester Woods Sub

MAP
OF
EAST CLAWSON STORM SEWER DRAIN
GENERAL PLAN and ASSESSMENT DISTRICT
TOWNSHIPS of TROY and ROYAL OAK
OAKLAND COUNTY
MICHIGAN

Drawn by [illegible] Scale 1" = 300'
Checked by [illegible]

No. 1 of 5 SHEETS

FILE COPY

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JAN 26 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE AND WALLACE D. BRADFORD,
Appellants,

vs.

EARL L. CLARK, DRAIN COMMISSIONER OF OAKLAND COUNTY, MICHIGAN, AND BOARD OF SUPERVISORS OF OAKLAND COUNTY, CITY OF ROYAL OAK,
Intervenor.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT AS TO JURISDICTION.

PAUL W. VOORHIES,
Counsel for Appellant.

VOORHIES, LONG, RYAN & MCNAIR,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE AND WALLACE D. BRADFORD,
Appellants,

vs.

EARL L. CLARK, DRAIN COMMISSIONER OF OAKLAND COUNTY, MICHIGAN, AND BOARD OF SUPERVISORS OF OAKLAND COUNTY, CITY OF ROYAL OAK.

STATEMENT OF BASIS OF JURISDICTION.

The appellants in the above entitled cause, pursuant to Rule No. 12 of the Rules of the Supreme Court of the United States, file this their statement showing the basis upon which they contend that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment of the Supreme Court of the State of Michigan in the above entitled cause.

A. Statutory Provision Believed to Sustain Jurisdiction.

The statute believed to sustain appellate jurisdiction is Section 344, Subdivision (a) of Title 28—Judicial Code and Judiciary, of the United States Code, U. S. C. A. Sec.

237 (a) Judicial Code, as amended, which provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal.

B. Statutes of the State of Michigan, Validity of which Is Involved.

In said cause the validity of the following statutes of the State of Michigan was drawn in question, on the ground that certain provisions thereof are, as to petitioners, repugnant to Article I, Section 10, of the Constitution of the United States, in that they impair the obligation of pre-existing contracts as embodied in bonds of East Clawson Storm Sewer Drain District held by petitioners.

The statutes drawn in question are:

(a) Act 114 of Michigan Public Acts 1937 (pages 180-183) as amended by Act 282, Michigan Public Acts 1939, (pages 540-545) and Act 234, Michigan Public Acts 1941 (pages 357-386).

(b) Act 155 of Michigan Public Acts 1937 (pages 238-244), as amended by Acts Nos. 29, 244 and 329 of Michigan Public Acts 1939 (pages 49, 453-457 and 848, respectively) and Act 363 of Michigan Public Acts of 1941 (pages 638-650).

(For convenience in referring to same, these will be called herein "the statutes of 1937.")

The pertinent provisions thereof are summarized as follows:

Act 114 of 1937, with amendments, provides for a different form of decree to be entered in tax sale proceedings than that which had previously been prescribed, and directed what effect should be given thereto. It provided that

the decree should direct the sale of delinquent tax lands and that if no bid therefor was received they should be bid in to the State, in which case, after a period of redemption, title to such lands should be absolute in the State, and all taxes and special assessments which are charged against or are liens upon such lands, and other liens and encumbrances against same of whatever kind or nature, shall be cancelled as of such date.

Act 155 of 1937, with amendments, is popularly known as the "Scavenger Sale Law." It provides that land, title to which has vested in the State by virtue of an unredeemed bid by the State under a sale in accordance with the decree referred to above, shall be sold at auction to the highest bidder, with the right of the prior owner to match the highest bid and buy on deferred payments. The minimum bid permitted is 25% of the assessed valuation as fixed and determined at the last assessment for the year preceding the vesting of title in the State of Michigan (Sec. 7).

The effect of a deed made pursuant to such sale is stated thus:

> "The board having jurisdiction is authorized for and on behalf of the State of Michigan to execute with the seal of the board attached such quit claim deeds, land contracts, leases or other contracts, documents or papers as may be necessary to carry out the provisions of this act. Any quit claim deed or deeds executed by the board or department shall convey title in fee to land under the provisions of this act, free from any encumbrances, including all taxes and special assessments which were cancelled by the decree pursuant to which the State obtained title * * *" (Sec. 9.)

Disposition of the funds obtained on the sale is directed as follows:

> "All moneys received by the State Land Office Board * * * under the provisions of this act, * * *

shall be credited to the general fund of the State, and after first deducting such commissions and maintenance costs as are authorized in sections 4 and 8 of this Act, shall be paid to the several county treasurers who shall remit the same to the several taxing units * * * in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this Act * * *. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments assessed or levied against said lands prior to the vesting of title in the State of Michigan." (Sec. 10.)

In brief summary, the meaning of these statutes as construed by the Supreme Court of Michigan, as applied to the situation in this case, is as follows: A parcel of land which has been tax delinquent for a specified period is offered for sale; if it is not redeemed or sold, title passes to the State and all existing liens and encumbrances are cancelled. It must thereafter be sold by the State Land Office Board, a state agency, at public auction, and at such sale a bid must be accepted if it is not less than 25% of the last assessed valuation, and the parcel then passes into private hands, often the hands of the prior owner, and is then exempt from any future levy of a deficiency assessment to pay the bonded debt of a drain district which, were it not for the 1937 statutes, would have to be levied against it.

C. Date of Judgment Sought to Be Reviewed and Date Upon Which Application for Appeal Is Presented.

The date of judgment sought to be reviewed is October 11, 1943. Application for an appeal from the aforesaid judgment to the Supreme Court of the United States, together with assignment of errors and this jurisdictional statement, was presented on the 9th day of December, 1943, to the Honorable Emerson Boyles, Chief Justice of the Supreme Court

of the State of Michigan, who on said date denied said petition and on the 16th day of December, 1943, appellants' petition for appeal, accompanied by their assignments of error and this statement of basis of jurisdiction, was presented to the Honorable Stanley Reed, Associate Justice of the Supreme Court of the United States.

D. Nature of Case and Rulings of Lower Court Bringing Same Within Jurisdictional Provisions Relied Upon:—Cases Believed to Sustain Jurisdiction.

This case involves a claim that legislation passed subsequent to the issuance of bonds by a state agency impairs the obligation of contracts embodied in the bonds and is, therefore, repugnant to Article I, Section 10, of the Constitution of the United States.

Petitioners, as holders of bonds of a Michigan district, contend that they are entitled to have enforced those laws which were in effect at the time the bonds were issued, which provide for tax levies sufficient to provide funds for the discharge of the bonded debt of such drain district, and that a combination of subsequently enacted statutes construed by the court to mean that such taxes cannot be levied, and that the issued bonds must go unpaid, constitutes such impairment of contract obligations as is forbidden by the constitutional provision above specified.

A drain district in Michigan is organized by proceedings detailed in Title XI, Michigan Compiled Laws 1929, Volume I, pages 1894 to 1955. The County Drain Commissioner conducts the proceedings, levies assessments to provide funds for the construction of drains, and may in behalf of the district issue bonds in advance of the collection of such assessments. Assessments are levied upon the basis of benefit, and the parties assessed may include counties, townships, cities and villages. Such assessments against municipalities are

called "at large assessments." An assessment may be divided into a number of annual installments, but the total assessment is declared to be a perpetual lien against the lands assessed until paid. (Sec. 4927, Michigan Compiled Laws 1929.) The assessment is based upon an apportionment of benefits made by the Commissioner in which he determines the percentage of the cost of the project which must be borne by each parcel of land in the district and the municipalities to be taxed at large. (Section 4895 id.) Additional assessments must be made in case the original amount assessed is insufficient for any cause which is apportioned on the same basis as the first assessment, and the Commissioner is obliged to make such additional assessment when the bonds have all fallen due and the amount in the drain fund is insufficient to pay the principal and interest thereon. The amount to be levied must be sufficient to make up the deficiency. (Sections 4917 and 4940 id.) Drain taxes must be collected in the same manner as state or other general taxes. (Sections 4927 and 4928 id.) The Board of Supervisors of the county must spread on the general tax rolls the assessments made by the Drain Commissioner. Sections 4924, 4925 id.)

At the time these bonds were issued the law in relation to the sale of lands against which there were delinquent taxes merely provided (Section 3459, Michigan Compiled Laws 1929) that the decree in tax sale proceedings should direct their sale by the County Treasurer. Subsequent sections provided that the bid must be for the amount of the delinquent taxes, interest and penalties, and if no bid was received the land must be bid in by the State, in which case the taxes assessed remained a lien upon the lands, but any person could purchase same from the State, (Section 3462 id.) at subsequent annual tax sales (Section 3471 id.) or from the auditor general, but always at a price sufficient to pay

the original tax, with penalties and interest (Section 3477 id.) Neither the sale of state tax lands, nor the sale of any of the bids of the state for which the time of redemption had not expired, would in anywise prejudice the right to enforce the collection of any tax subsequent to the year or years for which the same has been sold as aforesaid, and for the taxes and charges remaining unpaid for said subsequent year or years. (Section 2478 id.) After delinquency for five years, lands bid off to the state for the taxes of one or more of such years, (no application having been made to redeem or proceedings taken to set aside the taxes or remove the cloud occasioned thereby,) were deemed abandoned and could be deeded to the state. (Section 3520 id.) In that case all taxes charged against such lands in the office of the auditor general at the time they are deeded to the state are cancelled, the state, county and township bearing the share of the loss on such taxes that properly belongs to each, and lands so deeded were not subject to assessment for any purpose until they were again sold and deeded by the state, and notice of said sale given to the county treasurer by the commissioner of the state land office. (Section 3524 id.) As to exemptions, the law at the time these bonds were issued provided (Section 3390 id.) "that all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." Lands exempted were "(1) all public property belonging to the United States, (2) all public property belonging to the State of Michigan, except licensed homestead land, part paid lands held under certificates, and lands purchased at tax sales and still held by the state, (3) lands owned by any county, township, city, village or school district * * * used for public purposes." (Section 3395 id.) Certain other lands not necessary to mention here were exempt from general taxes, but not from special assessments for public improve-

ments. In re. Auditor General's Petition as to 1938 Tax Sale, 300 Mich. 80.

Petitioners, as purchasers of these bonds, were thus assured by statutes governing their issue that the original assessments pledged for their payment should remain a perpetual lien until paid, and that after all bonds of the issue had matured an additional deficiency assessment would be made in an amount sufficient for their payment, and, even in case of lands delinquent for five years and deeded to the state as abandoned lands, only such taxes against them would be cancelled as were charged in the office of the auditor general at the time they were deeded to the state. When the state by deed restored the land to private ownership, it was subject to all taxes and assessments which the state or its subordinate instrumentalities could cause to be levied, including deficiency drain assessments. Furthermore, additional deficiency assessments must be in amount sufficient to pay the bonds and all interest thereon, so that any loss caused by any land not being subject to tax would be made up by remaining lands and governmental units taxed at large.

Rulings of the lower court bringing the case within jurisdictional requirements relied on occurred in the following manner: Petitioners alleged in their pleading that they were entitled to have the laws existing at the time of the issuance of their bonds enforced and, therefore, prayed that the court enter a declaratory judgment requiring respondents to levy a full deficiency assessment. They further alleged that laws subsequently passed operating to remove the security for their payment were repugnant to Article I, Section 10, of the Constitution of the United States. In paragraph 5 of their petition they stated "that nothing contained in Act 155, Michigan Public Acts of 1937, as amended, or any other statutes in pari materia, abrogated or curtailed such provisions," (i.e. those relating to a de-

ficiency assessment,) "or could as against petitioners or other holders of bonds of said district abrogate or curtail the same, and that any interpretation of same in the manner contended by respondents would violate Article I, Section 10 * * * of the Constitution of the United States."

The trial judge ruled that lands sold under Act 155, Public Acts 1937, were exempt from an additional deficiency levy, and because of the large area thus exempted, no deficiency levy could be made.

Briefs filed in the Michigan Supreme Court argued the proposition that if the laws enacted in 1937 were given the construction which forbade a full deficiency assessment, they are repugnant to Article I, Section 10, of the Federal Constitution. (Appellants' brief, pp. 23-33, Appellees' brief, pp. 9 to 11, Appellants' reply brief, p. 7.)

The Michigan Supreme Court shows by its opinion that it recognized the necessity of deciding the question of whether the 1937 statutes, as it interpreted them, were in conflict with Article I, Section 10, of the Constitution of the United States. It stated the contention of petitioners thus, on page 508 of the official report, (Volume 306 Michigan Reports):

> "They (petitioners) contend that if the act is construed to exempt such lands from deficiency assessments, it does so in violation of the impairment of obligation clauses of the State and Federal Constitutions. They further contend that, even if such lands are exempt, the remaining lands and the municipalities against which the original assessment was spread at large are still subject to an additional tax for the purpose of retiring the unpaid drain bonds."

On page 510 it further said:

> "In considering appellants' argument with respect to the impairment of the obligations of the contract,

it is important that the underlying causes leading to the legislation, which appellants now attack, be fully comprehended and understood."

"We need not repeat the history of this legislation which is detailed in Baker v. State Land Office Board, 294 Mich. 587, 592 et seq., and which is quoted in our Birmingham decision. The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision."

After referring to the provision of Act 155, Michigan Public Acts 1937, which provides that each taxing unit shall be paid its pro rata share of the proceeds of the sale, the court says that "were it not for this act, under the then existing circumstances, the lands would have been rendered valueless for further revenue purposes because of accumulated delinquent taxes, and the bondholders would have realized nothing from their lien. We cannot, therefore, say that the bondholders' contract has been impaired when they received the maximum benefit under the circumstances."

A quotation is made from the opinion of this court in *Municipal Investors Assn.* v. *Birmingham*, 316 U. S. 153, and the court adds:

"If the lands were again subject to a deficiency assessment, after sale to the State and conveyance by it to a third party, the possibility of the restoration of this property to the tax rolls would be considerably lessened because prospective buyers might well hesitate to assume such an obligation."

It concludes its reasoning on the point relating to the impairment question by quoting from *Home Building and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, as follows:

"The economic interests of the state may justify the exercise of its continuing protective power, notwithstanding interference with contracts."

Petitioners believe that the decision of the Supreme Court of Michigan unjustly deprives them of rights guaranteed by Section 10, Article I, of the Constitution of the United States, and to an extent which is substantial, in that it forces them to bear the loss occasioned by subsequently enacted legislation in the following respects: (1) It deprives them of the right to a deficiency assessment against lands which are privately owned and otherwise subject to taxes, (2) it does not place upon other lands and the municipalities taxed at large the burden of making up fund deficiencies to the full extent as guaranteed by the law under which the bonds were issued. Removal of these resources for their payment of petitioners' bonds must inevitably result in their obtaining but a small portion of the moneys promised in said bonds.

It is an unwarranted assumption, entirely without support in the record, that the 1937 statutes afford bond holders the maximum benefit under the circumstances. It is true they receive a portion of the original assessment which was unpaid at the time the land was bid off to the state, but they are entitled to an additional levy upon such land when it is privately owned, just as holders of bonds of other municipal corporations having jurisdiction to tax said lands are entitled to the levy of taxes thereon for the purpose of raising money to pay their bonds. There is no ground to suppose that if such lands were not made exempt by such statutes as the court construes them, the owners thereof would not pay the deficiency assessment.

This court has not in the case of *Municipal Investors Assn.* v. *City of Birmingham*, 316 U. S. 153, ruled upon the federal questions here involved. It declined to do so for the reason that the charter of the Village of Birmingham, which was there invoked, did not require the deficiency assessment which was claimed. Since this court in that case held that Municipal Investors Association had no contract requiring

the levy of a deficiency assessment, it did not and could not pass upon the moot question of whether there would be an impairment of contract, if one existed. In the instant case the drain law unquestionably requires the deficiency assessment which petitioners seek. In prior decisions, notably *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, and cases there cited, this court has held that a state may not by subsequent enactments so reduce the tax resources for the payment of municipal debts that a large part thereof must go unpaid.

We believe that the Michigan Supreme Court has erroneously interpreted this court's decision in *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398. We do not understand it to go so far as to say that a legislature is free to impair contract obligations whenever in its judgment such impairment seems advisable in the public interest. Such an interpretation would nullify the constitutional provision.

Petitioners, therefore, represent that the questions involved herein are of a substantial nature and should be decided by this court. *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476-7; *Millsaps College* v. *City of Jackson*, 275 U. S. 129, 132.

Cases believed to sustain the jurisdiction are the foregoing, *W. B. Worthen Co.* v. *Kavanaugh* (*supra*), Mem. Opinion 293 U. S. 624; *Hamilton* v. *Regents of University of California* (*supra*); *Senn* v. *Tile Layers Protective Union* (*supra*); *Millsaps College* v. *City of Jackson* (*supra*). The judgment of the Supreme Court of the State of Michigan, which is the highest court in said state in which a decision in said suit could be had, was a final judgment, although it remanded the case to the lower court with directions to enter judgment in accordance with its opinion, since said

lower court had no further questions in the case to be decided. *Board of Commissioners* v. *Lucas,* 93 U. S. 108; *Mower* v. *Fletcher;* 114 U. S. 127; *Rio Grande & W. Ry. Co.* v. *Stringham,* 239 U. S. 44. Furthermore, a proceeding for a declaratory judgment is a suit within the meaning of Section 344, Sub. (a) of Title 28—Judicial Code and Judiciary of the United States Code Annotated, Section 237a, Judicial Code. *Nashville, Cincinnati & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249.

Attached hereto and marked Exhibit A is a true copy of the judgment of the Supreme Court of the State of Michigan sought to be reviewed. Exhibit B is a true copy of the opinion of said court upon the rendering of said judgment, and Exhibit C is a true copy of the opinion of the Circuit for the County of Oakland, rendered before the entry of its judgment.

Wherefore, petitioners submit that the Supreme Court of the United States has jurisdiction of this appeal.

PAUL W. VOORHIES,
VOORHIES, LONG, RYAN & MCNAIR,
Attorneys for Petitioners & Appellants,
2046 Penobscot Building,
Detroit, Michigan.

Dated: December 16, 1943.

EXHIBIT A.

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eleventh day of October, in the year of our Lord one thousand nine hundred and forty-three.

Present the Honorable Emerson R. Boyles, Chief Justice; Bert D. Chandler, Walter H. North, Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Associate Justices.

42415.

KENNETH M. KEEFE, and WALLACE D. BRADFORD, *Plaintiffs and Appellants,*

vs.

EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY, *Defendants.*

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Oakland, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Oakland be and the same is hereby in all things modified and affirmed, and the cause remanded to the Court below for the entry of a judgment in conformity with the opinion filed herein. It is further ordered that no costs be awarded herein.

STATE OF MICHIGAN, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of December, in the year of our Lord one thousand nine hundred and forty-three.

JAY MERTZ,
Clerk.

[SEAL.]

EXHIBIT B.

STATE OF MICHIGAN, SUPREME COURT

JUNE TERM, 1943

Filed October 11, 1943

KENNETH M. KEEFE and WALLACE D. BRADFORD, *Petitioners-Appellants,*

v.

EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY, *Respondents-Appellees.*

Before the Entire Bench

BUSHNELL, J.:

Petitioners Keefe and Bradford have appealed from a declaratory judgment which determined that respondents, Drain Commissioner and Board of Supervisors of Oakland County, are not obligated, by § 18, chapter X of Act No. 316, Pub. Acts 1923, as amended by Act No. 331, Pub. Acts 1927, and Act No. 129, Pub. Acts 1939, 1 Comp. Laws 1929, § 4940 (Stat. Ann. § 11.104), to levy an additional assessment to cover the deficiency in a drain tax. Petitioners are the owners of bonds, which are a part of an original issue in 1927, of $300,000, to finance the construction of the East Clawson Storm Sewer Drain.

This improvement was held to be a legal drain and the assessment, therefore, valid in Villiage of Clawson *v.* Van-Wagoner, 268 Mich. 148. The original assessment roll was

payable in annual installments from 1928 to 1937, inclusive, and was levied as follows: 77.5 per cent. against lands in the drainage district; 3.5 per cent. against the county at large; 2.5 per cent. against Township of Troy; 6.5 per cent. against the Township of Royal Oak; and 10 per cent. against the Village of Clawson. All of the bonds had matured by May 1, 1938, and as of December 31, 1941, $33,440 was due for interest and $223,000 for principal.

The assessment installments were levied for four years from 1927 to 1931, and then discontinued. In 1937, in contemplation of a refunding arrangement, a supplemental roll was prepared spreading the remaining six installments of principal over a period extending from 1937 to 1961, and the accumulated interest over a ten year period. The failure to levy after 1931 was due to a large tax delinquency. During 1939 and 1940 about 47 per cent. of the lands in the district were bid in by the State at tax sales. How much of these lands have since been returned to private ownership is not disclosed by the record. Before negotiations between the bondholders and the drain commissioner were consummated, the case of Municipal Investors Association v. City of Birmingham, 298 Mich. 314, was decided on June 30, 1941. Respondents contended that this decision was authority for the proposition that lands in the drainage district which passed through a "scavenger sale" became exempt from any deficiency assessment for unpaid drain taxes. The parties held the refunding plan in abeyance pending decision of the Supreme Court of the United States in the Birmingham appeal, which decision was rendered on April 27, 1942, and reported in 316 U. S. 153, 62 S. Ct. 975, 86 Law Ed. 1341. This case was commenced June 25, 1942.

Petitioners in the instant case argue that the action of the Supreme Court of the United States in the Birmingham case was inconclusive of their rights, and that it became necessary for them to resort to declaratory judgment proceedings in the state courts. The circuit judge held that our decision in the Birmingham case was conclusive of the issues involved, and that lands sold by the State Land Office Board, under the provisions of Act No. 155, Pub. Acts 1937, Mason's Cum. Supp. 1940, § 3723-1 et seq. (Stat. Ann.

§ 7.951 et seq.), were not subject to a deficiency assessment, and since a large portion of the lands in the district were lost to the possibility of reassessment, a deficiency assessment upon the remaining lands which had not been sold for delinquent taxes was "contrary to all the established principles of uniformity and equality in assessment as guaranteed by the Constitution," in that such an assessment "would be a tax having no relationship to benefit."

Appellants now argue that lands which have been sold to the State for delinquent taxes are not exempt from the deficiency assessment after their resale by the State, and that, if the act in question provides for such an exemption, it is in violation of Section 9 of article X of the Constitution of 1908, which reads:

"The power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any municipal corporation shall be a party."

They also contend that, if the Act is construed to exempt such lands from deficiency assessments, it does so in violation of the impairment of obligation clauses of the State and Federal Constitutions. They further contend that, even if such lands are exempt, the remaining lands and the municipalities against which the original assessment was spread at large are still subject to an additional tax for the purpose of retiring the unpaid drain bonds.

The section of the General Drain Law, upon which petitioners rely, reads in part:

"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, whether such insufficiency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency." 1 Comp. Laws 1929, § 4940, as amended by Act No. 129, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 4940, Stat. Ann. 1942, Cum. Supp. § 11.104).

The general drain law must be read and construed together with the general property tax law of the State for the reason that:

"All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. * * *." General drain law (chap. 10, § 5, 1 Comp. Laws 1929, § 4927 (Stat. Ann. § 11.91).

The general property tax law, § 67, 1 Comp. Laws 1929, § 3459, as last amended by Act. No. 234, Pub. Acts 1941 (Comp. Laws 1942, § 3459, Stat. Ann. 1942 Cum. Supp. § 7.112), provides that the final decree for the sale of lands assessed shall contain, among other provisions, the following:

"It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes, special assessments, which are charged against or are liens upon such parcel, and other liens and encumbrances, against such parcel, of whatever kind or nature, shall be cancelled as of such date."

The law further provides in the State Land Office Board Act (Act No. 155, § 9, Pub. Acts 1937, as amended by Act No. 363, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 3723-9), Stat. Ann. 1942 Cum. Supp. § 7.959):

"Any quitclaim deed or deeds executed by the board or department shall convey title in fee to land under the provisions of this act, free from any encumbrances, including all taxes and special assessments which were cancelled by the decree pursuant to which the state obtained title."

The latter act was discussed in Municipal Investors Association *v.* City of Birmingham, 298 Mich. 314, and those

members of the court who concurred in the opinion of Mr. Justice Sharpe held that "anything is an incumbrance which constitutes a burden upon the title," and that "it would naturally follow that the possibility of reassessment would constitute an incumbrance and thus be cancelled."

Appellants argue that the Birmingham case may be distinguished on its facts and is not conclusive of the issues involved in the instant appeal because the legislature, by its amendment to §67 of Act No. 206, Pub. Acts 1893, (1 Comp. Laws 1929, §3459, Stat. Ann. §7.112), effective June 16, 1941, indicated that only those "special assessments which are charged against or are liens upon such parcel," are to be cancelled, and not deficiency assessments which never had been charged against the land, and were not, therefore, liens at the time of sale. We are unable to agree with this argument. The decree of sale provided, as required by statute, that "other liens and incumbrances against such parcel of whatever kind or nature shall be cancelled as of such date." Our Birmingham decision is authority for the proposition that the possibility of reassessment would constitute an incumbrance, and is, therefore, cancelled.

In considering appellants' argument with respect to the impairment to the obligations of the contract, it is important that the underlying causes leading to the legislation, which appellants now attack be fully comprehended and understood.

We need not repeat the history of this legislation, which is detailed in Baker *v.* State Land Office Board, 294 Mich. 587, 592 et seq., and which is quoted in our Birmingham decision. The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision.

The statute, Act No. 155, §10, Pub. Acts 1937, as amended by Act No. 363, Pub. Acts 1941 (Comp. Laws Supp. 1942, §3723-10, Stat. Ann. 1942 Cum. Supp. §7.960), provides that, after the sale of property by the State Land Office Board, each tax assessing unit shall be paid its pro rata share of the proceeds of the sale. The bondholders' maximum security was thus realized after the tax lien was foreclosed

when the subsequent sale of the property was consummated. Were it not for this act, under the then existing circumstances, the lands would have been rendered valueless for further revenue purposes because of accumulated delinquent taxes, and the bondholders would have realized nothing from their lien. We cannot, therefore, say that the bondholders' contract has been impaired when they received the maximum benefit under the circumstances. As said by the Supreme Court of the United States in the Birmingham appeal:

"If the stated powers of the Village to levy an assessment on improvement district property required that the lots assessed, after sale for default in their installments, should be subject to an additional assessment to cover such deficiencies, the burden might depress their value to a point where little if anything could be realized for the bondholders, and successful sales for nonpayment would be frustrated. This would clearly be true where, as here, a very large proportion of the assessment were defaulted."

To this we add the observation that, if the lands were again subject to a deficiency assessment, after sale to the State and conveyance by it to a third party, the possibility of the restoration of this property to the tax rolls would be considerably lessened because prospective buyers might well hesitate to assume such an obligation.

The rule that existing laws are read into contracts, in order to establish the obligations between the parties, is subject, however, to the well-known reservation of the essential attributes of the sovereign power, and this reservation must also be read into contracts as a postulate of the legal order. Baker *v.* State Land Office Board, 294 Mich. 587. As stated by the Chief Justice in Home Building & Loan Association *v.* Blaisdell, 290 U. S. 398, 437, 78 Law Ed. 413, 428:

"The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

The act does not, as appellants argue, surrender the taxing power as prohibited by section 9 of article X of the

Michigan Constitution, because the lands in question are subject, from the time that the purchaser's bid is accepted by the State Land Office Board, to all taxes, other than those extinguished by the tax sale. Wilson *v.* City of Pontiac, 294 Mich. 79. That portion of the act cancelling taxes is a valid exercise of the police power. The State's immunity from taxation on the lands while held by it is in no way passed on to the subsequent individual purchaser of these lands from the State.

Appellants contend that, if it be held that the deficiency assessment cannot be levied against lands purchased from the State, that it can, nevertheless, be levied against those lands which have not been sold for delinquent taxes and against those municipal units against which a proportion of the original assessment had been spread at large.

The trial judge determined that such assessment would violate the uniformity clause of the Constitution. If the entire amount of the deficiency assessment were spread against such lands and taxing units, the argument would be logical and sound. However, it is only fair and reasonable that such lands and municipalities continue to bear their just proportion of the cost of improvement originally imposed. The act does not cancel incumbrances on lands that have not been sold for delinquent taxes nor those portions of the special assessments which were spread at large against the several municipalities.

A deficiency assessment should be spread and there should be deducted from 77.5 per cent. of the total deficiency that portion which would have been applicable to lands in which the State acquired absolute title under delinquent tax sales, and the remainder of the 77.5 per cent. should be spread against lands not sold under that act. 22.5 per cent. of the deficiency assessment should be spread as follows: 3.5 per cent. against the county at large, 2.5 per cent. against the Township of Troy, 6.5 per cent. against the Township of Royal Oak, and 10 per cent. against the Village of Clawson.

This determination is in accord with the general principle stated by Mr. Justice Holmes in Gast Realty & Investment Co. *v.* Schneider Granite Company, 240 U. S. 54, 60 Law Ed. 522.

"The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. * * * But * * * if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The declaratory judgment entered in the circuit court is modified and affirmed, and the cause is remanded for the entry of a judgment in conformity with this opinion. The question being a public one, no costs will be allowed. It is so ordered.

EXHIBIT C.

Opinion of the Circuit Court for the County of Oakland in Keefe, et al., v. Earl L. Clark, Drain Commissioner, et al. (Filed December 16, 1942).

Petitioners as holders of bonds of the East Clawson Drain District seek a declaratory judgment to determine the obligation of the respondent drain commissioner to impose a deficiency assessment upon all the lands as determined benefited in the drain district.

An interesting factual circumstantial background, unessential of narration as a prerequisite of determination, is that out of an issue of bonds dated November 1st, 1927 in the principal sum of $300,000 to finance the cost of construction there remains due and unpaid the sum of $223,000 plus accrued interest from May 1st, 1939. The cost of improvement was distributed in these percentages: the district 77.5%; County of Oakland at large 3.5%; Township of Troy at large 2.5%; Township of Royal Oak at large 6.5% and Village, now City of Clawson at large 10%.

Proofs offered in the case show that 65% of the lands in the district are either retained or have been sold by the state as tax delinquent land, subject to the provisions of

the Scavenger Sale Act, being Act No. 155 of Public Acts of 1937 as amended.

Respondents offer objection to a spread of the deficiency assessment, stating it is a factual and legal impossibility. The principal objection is that the aforementioned 65% of the lands in the district retained or sold by the state under Act No. 155 of Public Acts of 1937 as amended are not subject to the levy of such a deficiency assessment in the interpretation of Municipal Investors Association v. City of Birmingham, 298 Mich. 314.

Observations are here made in an endeavor to form an opinion based upon logical deductions. Bondholders acquire securities through a contract with the issuing unit of government within the confines of the law existent at time of issue.

The phraseology of Section 18, Chapter 11 of Act No. 331 of Public Acts of 1927 referred to as Section 4940 of Compiled Laws of 1929, M. S. A. 11.104 as amended by Act No. 129 Public Acts of 1939, a pertinent statute as of the date of issue of the bonds reads as follows, "If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, whether such insufficiency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasury and be used for the maintenance of the drain."

Respondent county evidences concern over the provision of Section 4937 of the Compiled Laws of 1929 providing that, "In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore issued when they become due, the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes collected: Provided, That such advancement by the county shall not cause the

total debt of the county to exceed the constitutional limitation thereof," and asks that it be construed as not making the bonds a general obligation or as pledging the full faith and credit of the county for their retirement. The question is vital to the ultimate full retirement of the bonds, but is not one of the objectives of the declaratory judgment sought by the petitioners.

Yielding to a hoped pardonable temptation, some comment is here made on the intriguing issue without an attempt at solution pronouncement. It is made to elicit interest of others vitally concerned not here litigant. The section is now repealed and the wisdom of its enactment apparently repudiated. The provision requiring advancement was held a sustainable legislative imposition incident to the act of the issuance of the bonds. Moore v. Harrison, 224 Mich. 512. The rights and duties of a county are not based upon contractual relations. They are organized for public purposes and their powers, rights and duties may at any time be modified or abolished by legislative action. Township of Clearwater v. Board of Supervisors of Kalkaska County, 187 Mich. 516. This gives legislature right to dictate the application of general funds on hand raised for a public purpose as interpreted in University of Michigan v. Pray, 264 Mich. 693. The advance provision was there held a remedial mandatory right. It was held not subject to avoidance as to an interim issue by a change of the remedial provision in Whitman v. Township of Royal Oak, 269 Mich. 146. Some logic may be found in recognizing, in the furtherance of a public purpose, an issuing unit of government to facilitate sale of special assessment bonds, may agree to advance from its general fund sums for payment in event of a special assessment fund deficiency.

It is exceeding troublesome to find the limitation on advancement that must logically exist. It is stated in the case of the Township of Royal Oak v. City of Pleasant Ridge, 295 Mich. 284, to advance does not transform special assessment bonds into general obligation bonds or change their character. The cited cases seem to indicate the county is not relieved from advancing by reason of the fact that certain lands in the assessment district are lost through

tax sale and there is no chance reimbursement and that advance is not predicated upon the possibility of reimbursement. May advance then be interpreted as a word implying general obligation liability carrying the full faith and credit of the county? If this is true the general fund of the county must meet the assault of hundreds of special assessment bond holders attacking for funds they obviously will never receive from special assessment accounts.

The drain commissioner in establishing a drain project is not the agent of the county. He is performing a special statutory duty for the drain district. Section 4937 of the Compiled Laws of 1929 providing for the payment of special assessment bonds out of the general fund in event of a deficiency does not establish county liability. These are the holdings of Brooks v. County of Oakland, 268 Mich. 637. The problem of advancement resulting in a general obligation was left for further consideration in Township of Royal Oak v. Pleasant Ridge supra. When a case is established, as may be possible with the East Clawson Drain District, that exceeding county liability ensues through the hopelessness of reimbursement, that the orderly functions of county government are imperiled through advancement, that the county is building projects of great magnitude for the restricted benefit of a few at the expense of all, the limitations on advancement, here suggested as logically existing, may be found. If advancement from the general fund does not carry the necessity of a general levy to pay a deficiency, the problem may be over-emphasized. Nevertheless, repeated demands for payment out of the general fund creates an aggravating situation not conducive to the orderly process of government.

This court for determination of issues raised by petitioners, in compliance with Act No. 36 of the Public Acts of 1929, Section 13903-13905, Compiled Laws of 1929, offers this opinion. The availability of lots sold under Act No. 155 of Public Acts of 1937 as amended for a deficiency assessment under Act No. 331 of Public Acts of 1927 as amended must be viewed in the reflected light of Municipal Investors Association v. City of Birmingham supra. It was there held that the purchasers of bonds are assumed

to have purchased with knowledge that the lien for payment upon the properties securing the taxes and assessment may be discharged. A new chain of title originates free from any incumbrances. Anything is an incumbrance which constitutes a burden upon the title of property. The possibility of reassessment for the benefit is a liability held to constitute an incumbrance. A drain tax is a lien from the time there is an assessment for benefit. A warranty deed obligated the grantor to payment even though the tax could not have been paid at the time the deed was given. Lindsay v. Eastwood, 72 Mich. 333. It is here pointed out that Section 4939 of Compiled Laws of 1929 specifically states that payment in full of drain tax is a payment in full in light of possible reassessment. Reassessment must be predicated upon the basis of benefit.

This case is controlling. Lands sold under Act 155 of Public Acts of 1937 as amended are not subject to a deficiency reassessment. Under this holding, 65% of the lands in the district are lost to the possibility of reassessment.

The right to have a deficiency assessment spread against the remaining 35% of the lands in the district has not been presented sufficiently to justify a determination that would under all possible eventualities be applicable. The parties in interest in the district are not here represented. Many questions involving their rights have not been raised. At the time of hearing of objections as to the necessity of the project, the law contained no provision for a deficiency assessment, except as contained in Section 18, Chapter 10 of Act 316 of Public Acts of 1923 which omitted phraseology of Section 18 of Chapter 10 of Act 331 of Public Acts of 1927 providing for the levying of such an assessment due to the failure to sell any lands for delinquent taxes. Such a provision was enacted in the interim between that time and the issuance of the bonds. This may have a material effect upon the rights of the parties. The regular special assessment for the retirement of the bonds was not levied for a period of several years. The interest of those paying may have been prejudiced thereby effecting their reassessment obligation. Sums may have been lost through such

inaction that would have otherwise been obtainable. The remedy of reassessment was not sought promptly upon the maturity of the bonds. A deficiency assessment upon the remainder of the property in the district which did not pass through the Scavenger Sale is contrary to all the established principles of uniformity and equality in assessment as guaranteed by the constitution as pointed out by the intervenor City of Royal Oak. "Special assessments or special taxation, therefore, is lawful and constitutional only when founded upon specific benefits accrued from the improvement for which the tax or assessment is laid. In other words, the test in all special taxation or assessment proceedings which is constantly invoked by the courts, is that the assessment should not exceed the special benefit to the property." McQuillin Municipal Corporations, 2nd Edition, Vol. 5, page 576. "Special Assessments shall not be levied in excess of the benefits conferred, whether by valuation, front foot area, or any other method. Norwood *vs.* Baker, 172 U. S. 269, 277, 288." "Obviously local assessment or special taxation laws cannot ignore constitutional restrictions or guarantees, as due process of law, equal protection of the law, or permit taking private property without just compensation." McQuillin Municipal Corporations, 2nd Edition, Section 2167. Such an assessment would be a tax having no relationship to benefit and is not valid special assessment levy.

There should be funds available from lots sold and those that may be sold under Act No. 155 of Public Acts of 1937 as amended to materially alter and reduce the amount of the deficiency. It seems illogical to believe that lots in this section of the metropolitan area have sold and will be sold if the matter of sale is judiciously handled, for sums materially less than the determined beneficial improvement tax. It would seem that by legislative action or otherwise, application of funds so received should be to the retirement of the bonds. Other functions of government have succeeded in operation and application of a part of the proceeds thereto does not seem essential. They are most benefited by a return of the property to the tax rolls to support the present operation of govenment.

The provision for a deficiency assessment was enacted to cover a normal condition, not such an abnormal one as here presented. An attempt at reassessment on the basis of the percentage of benefit allocated to each parcel, if legally possible, with the exclusion of the excepted Scavenger Sale lots would not accomplish the retirement of the bonds. It would only accomplish confiscation of property. Any attempt at reassessment should at all events be predicated upon a determination that the same is not an idle act for it is well establishel legal axiom that courts will not order nor direct acts of this nature. Obviously for the reasons here enumerated it is determined, on the showing here made, that a deficiency assessment upon the remaining portion of the district omitting the area embraced in the lots sold under Act No. 155 of Public Acts of 1937 as amended may not be made.

GEORGE B. HARTRICK,
Circuit Judge.

Dated: December 16, 1942.

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United States of America

IN THE

Supreme Court of the United States

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK,
Intervenor

BRIEF FOR APPELLANTS ON MOTION TO DISMISS

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BRIEF FOR APPELLANTS ON MOTION TO DISMISS

FACTS APPLICABLE TO MOTION TO DISMISS

Appellees have partially stated the facts which ought to be known in passing on this motion, but are incorrect in their assumption that the Michigan Supreme Court was not asked to and did not pass upon the question of whether Act 114, Michigan Public Acts 1937, was repugnant to Article I, Section 10, of the Federal Constitution.

Throughout the argument they betray a misunderstanding as to the purpose of this case, evidently supposing that petitioners' object is to obtain a ruling that unpaid portions of the original assessment are enforceable against lands which have gone through the scavenger sale. In order to center the court's attention upon the real issue, we will review the pleadings, proceedings and the opinions.

PETITION (3): The allegations are (1) ownership of a part of the issue of bonds and insufficient funds for their payment, (2) failure to levy the deficiency assessment as provided in the portion of the drain law (Section 4940, Michigan Compiled Laws 1929) quoted on p. 3 of the typewritten copy of the opinion of the Supreme Court, Exhibit B attached to the jurisdictional statement, (3) willingness of the parties to enter into a refunding arrangement if it can be determined that all privately owned lands are subject to a deficiency assessment, (4) dispute as to the effect of Act 155, Michigan Public Acts 1937, and statutes *in pari materia* upon the right to the deficiency assessment authorized in Section 4940, Michigan Compiled Laws 1929 *(supra)*. Prayer for determination that Section 4940, Compiled Laws, requires such assessment, notwithstanding any subsequent legislation.

ANSWER (37): Admission of the fact that bonds are outstanding and unpaid; denial that the respondents are required to make any deficiency levy; reliance upon *Municipal Investors Association v. City of Birmingham*, 300 Mich. 501.

TRIAL COURT'S OPINION (41) finding that 65% of lands in the district are "either retained or have been sold by the state as tax delinquent land, subject to the provisions of the Scavenger Sale Act, being Act No. 155 of Public Acts of 1937, as amended." Determination that

Municipal Investors Association v. City of Birmingham (supra) requires decision that such lands are not subject to a deficiency levy, and this prevents all deficiency levies.

STATEMENT OF REASON AND GROUND FOR APPEAL (2): Assignment of errors on the part of trial court in holding that no deficiency levy could be made, and that privately owned lands are exempt from such levy.

OPINION OF SUPREME COURT: (Exhibit B to Jurisdictional Statement.) Court states facts and contentions of the parties, and ruling of trial court, to be "that lands sold * * * under the provisions of Act 155, Public Acts 1937 * * * were not subject to a deficiency assessment, and since a large portion of the lands in the district were lost to the possibility of reassessment, a deficiency assessment upon the remaining lands which had not been sold for delinquent taxes was 'contrary to all established principles of uniformity and equality in assessment as guaranteed by the Constitution,' in that such assessment 'would be a tax having no relationship to benefit.' "

Contention of appellants is stated thus: "Lands which have been sold to State for delinquent taxes are not exempt from the deficiency assessments after their resale by the State, and that, if the act in question provides for such exemption, it is in violation of 'a section of the state constitution (not relevant to the federal question),' and they further contend 'that if the act is construed to exempt such lands from deficiency assessments, it does so in violation of the impairment of obligations clause of the State and Federal Constitutions.' "

The court then quotes from four statutes, (a) the provision of the drain law directing a deficiency assessment, (b) provision of the drain law requiring collection of drain taxes in the same manner as general taxes, (c) pro-

vision directing what the decree on a tax sale shall say. The court must here note that in connection with this provision, while no mention is made of Act 114, Michigan Public Acts 1937, the decree provision quoted first came into the law by virtue of that statute, which was an amendment to 1 Comp. Laws 1929, Section 3459. (d) Provisions of Act 155 to the effect that a quit claim deed from the State Land Office Board conveys title free from all encumbrances, including all taxes and special assessments cancelled by the decree pursuant to which the State obtained title.

The court then says: "The latter Act was discussed in *Municipal Investors Association v. City of Birmingham* • • •" and "held that 'anything is an encumbrance which constitutes a burden on the title,' and that 'it would naturally follow that the possibility of reassessment would constitute an encumbrance and thus be cancelled.'"

The court then considers reasons advanced by appellants against this meaning, but says: "Our Birmingham decision is authority for the proposition that the possibility of reassessment would constitute an encumbrance, and is, therefore, cancelled." It then turns to the federal question, saying: "In considering appellants' argument with respect to the impairment to the obligations of the contract, it is important that the underlying cause leading to the legislation, which appellants now attack, be fully comprehended and understood." It refers to *Baker v. State Land Office Board*, 294 Mich. 587, 592, and the Birmingham case, saying that the impairment argument was denied in each. It then notes that Act 155 provides for division between various taxing units of the money received on the sale of properties, and concludes: "That portion of the Act cancelling taxes is a valid exercise of the police power." The act last mentioned is Act 155, hence it must be the one to which the court attributes the effect of extinguishing the right to a deficiency assessment.

ARGUMENT

SUMMARY OF POINTS ASSERTED

1. It is Act 155, Public Acts 1937, with amendments, which the State Court held to be the bar to the right claimed by appellants.

2. But if it should be decided that Act 114, Public Acts of 1937, is the bar to the rights claimed by appellants, there is no impediment to this court's consideration of same with respect to the contract clause of the Federal Constitution.

3. Appellees' request embodied in its motion that the decision of the Michigan Supreme Court be affirmed should be denied.

I.

IT IS ACT 155, PUBLIC ACTS 1937, WITH THE AMENDMENTS, WHICH THE STATE COURT HELD TO BE THE BAR TO THE RIGHT CLAIMED BY APPELLANTS

The opinion of the Michigan Supreme Court must be accepted as the authoritative statement of the meaning of the acts of the Michigan Legislature. When it points to a certain statute and says that it means that holders of these bonds may not have the full deficiency assessment guaranteed to them by the law which entered into and formed a part of their bond contract, it is useless to argue that it would be more logical to say that some other statute had that effect. It is the law of the case that it was Act 155 which has changed appellants' rights, because the Michigan Supreme Court in its opinion has said so. It has held itself bound by its prior decision in the Birming-

ham case, the same decision invoked by respondents in their answer. It has held that the Birmingham case interpreted Act 155 to bar the deficiency assessment there requested. It nowhere says that this result follows from Act 114, and its quotation from this statute must be interpreted as an aid to its construction of Act 155, since reference to statutes *in pari materia* passed at the same session of the legislature and resulting from the same legislative purpose, frequently aids a court in interpreting language of doubtful meaning.

It seems to us quite logical for the court to consider Act 155 as the one which bars the deficiency assessment, once it has arrived at the conclusion that the possibility of a reassessment is an encumbrance, for it is only through the operation of this Act that lands in the drain district acquired by the State can get back to private ownership. An owner of lands who claims them to be exempt from a tax of this nature must, in order to present his argument that they are exempt, point to this statute as the source of his title, and must claim that it conferred the exemption. If such statute had been silent as to the effect to be given to a quit claim deed from the State Land Office Board, it is difficult to see how a purchaser could resist the imposition of an additional assessment. There would be no statutory provision which he could invoke as a declaration of a legislative purpose that his lands should not be subject to any assessment which other statutes required should be levied.

II.

BUT IF IT SHOULD BE DECIDED THAT ACT 114, PUBLIC ACTS OF 1937, IS THE BAR TO THE RIGHTS CLAIMED BY APPELLANTS, THERE IS NO IMPEDIMENT TO THIS COURT'S CONSIDERATION OF THE SAME WITH RESPECT TO THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION

It must be recognized that this court has been assigned the duty of reviewing state decisions which appear to deprive citizens of rights enjoyed under the Federal Constitution. As a reviewing court, it is entitled to know that there was some ruling by the lower court on a question within this court's jurisdiction, and that its determination was essential to the disposition of the case. The language of Title 28.344a is broad. It is only essential that the validity of a state statute under the Federal Constitution be "drawn in question" and that the state court shall have upheld the validity. Congress has not declared how or when the validity of such statute be drawn in question. It is enough if this court see by fair intendment that there was a federal question in the case, that it was considered by the lower court, and that a decision was reached which was vital to the ultimate disposition of the case.

There must naturally be a variety of circumstances under which a federal question may be presented. Frequently it must happen that it comes into the case after it is far advanced, *e.g.*, where it furnishes the basis of rebuttal against a defense. Since a plaintiff is not obliged to anticipate a defense and plead legal conclusions against same, it cannot be expected in all cases that the pleadings in the trial court should show the raising of the federal question. This is particularly true in the class of cases to which this belongs—claims by bondholders that taxing

officials should levy the taxes necessary to provide funds for the payment of their bonds. In support of their claim they must point to a statute under which the bonds were issued which requires such levy. If the defendant officials admit the existence of such a statute, they must plead matters in avoidance. When such matters involve subsequent legislation which abrogates in whole or in part the former statute invoked by bondholders, two questions may arise: (1) whether the statute means what the defendants say it does, and (2) whether it constitutes an impairment of contract rights. In such a situation the court does not really arrive at the point where the second question must be considered until after it has interpreted the subsequent statute and decided that it limits or abrogate the former one. If at that time it is apparent that the court has considered and ruled upon the question with respect to the Federal Constitution, it has been "drawn in question" as provided in the Acts of Congress defining this court's jurisdiction.

From some of the cases cited by appellees on p. 7 of their brief, it appears that they have failed to note that it is no longer the rule that the record itself must show that a federal question was raised, and that it is insufficient to show it by the lower court's opinion. It was once the provision of the statute that the record must itself show the raising of the federal question, and this explains *Michigan Central Ry. Co. v. Michigan Southern Ry. Co.*, 19 How. 379. In a later decision, *Murdock v. Memphis*, 20 Wall. 590, 633, decided after there had been a change of the statute, this requirement was held to be no longer applicable. In *San Jose L. & W. Co. v. San Jose Ranch Co.*, 189 U. S. 177, where a federal claim under an Act of Congress was invoked as rebuttal to a defense and there was a motion to dismiss, the court in denying the motion said:

"While the right under the Act of 1887 (the Act of Congress) thus considered was not originally specially set up and claimed by plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one that appears to have been insisted upon in the argument; and under the rule of this court requiring the opinion to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed' that it was fully considered in the opinion and ruled against plaintiff in error. (Citations.) These must be considered as leading, under our change of rule, to a different result from that reached in some prior cases (citations) in which we held that the opinion of the state court could not be resorted to for the purpose of showing that a question of federal cognizance was decided."

In *State of Montana v. Rice*, 204 U. S. 291, 299, the court in more general terms declared:

"Where it clearly and unmistakably appears from the opinion of the state court under review that a federal question was assumed by the highest court of the state to be in issue, was actually decided against the federal claim, and the decision was essential to the judgment rendered, it is sufficient to give this court authority to re-examine that question on writ of error."

Other decisions to like effect are:

Sully v. National Bank, 178 U. S. 289;
Chicago, Rock Island, etc. Ry. Co. v. Perry, 259 U. S. 548;
Miedrick v. Lauenstein, 232 U. S. 236;
North Caroline Ry. Co. v. Zachary, 232 U. S. 248;
Home Insurance Co. v. Dick, 281 U. S. 397;
Whitfield v. State of Ohio, 297 U. S. 431;
Herndon v. Lowery, 301 U. S. 242.

In their work entitled "*The Jurisdiction of the Supreme Court,*" Robertson and Kirkham say, Art. 77:

> "If the highest state court assumes that the record sufficiently presents a federal question and proceeds to decide it, the Supreme Court will look no further to determine whether it was properly raised, for it is an elementary rule that it is irrelevant to inquire how and when a federal question was raised in a (state) court * * * when it appears that such question was actually considered and decided."

The liberal interpretation required in order that this court can perform the function assigned to it is illustrated in the following, from *Bryant v. Zimmerman*, 278 U. S. 63:

> "There are many ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrase is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by fair intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment is to deny the claim, that is enough."

Applying these principles to the instant case, let us suppose that the Michigan Supreme Court had said substantially as follows: "Appellants are in error in supposing that Act 155 has the effect of changing the duties and obligations of respondents; the change is produced by Act 114," and had proceeded in its argument as to why the legislation does not in its opinion impair the obligation

of contract contrary to the Federal Constitution." Could anyone suppose that the federal question had not been brought to its attention and decided?

We think appellees' brief affirmatively shows this. They admit that in petitioners' initial petition they contended that neither Act 155 nor any other statute *in pari materia* could have the effect of abrogating or curtaining their rights without being in conflict with Article I, Section 10, of the Federal Constitution. They admit that in their reply brief in the Michigan Supreme Court appellants discussed Acts 114 and 155 of 1937 in connection with the impairment argument. In the face of the state court's decision of the impairment argument with reference to the statutes passed in 1937 to bring about a rehabilitation of lands long tax delinquent, there is no point in urging upon this court an examination of the precise language of the statement of questions which prefaced appellants' brief. The Michigan court certainly did not regard itself confined thereby, and since it is no concern of this court how or when the federal question was presented, so long as it appears that it was actually considered and decided, the entire argument in support of the motion to dismiss fails.

III.

APPELLEES' REQUEST EMBODIED IN THEIR MOTION, THAT THE DECISION OF THE MICHIGAN SUPREME COURT BE AFFIRMED, SHOULD BE DENIED

A motion to affirm can only be granted where it appears that there is no debatable ground for assailing the decision of the lower court. Generally this exists only when this court has previously ruled on the precise question against the contention of appellant. This, of course, cannot be said with respect to this case.

By our jurisdictional statement we show a state of law existing at the time the bonds in question were issued, which must be considered as having entered into and formed a part of the contract, under which it would have been the duty of respondents to levy and spread a deficiency assessment against all privately owned lands in the drain district, irrespective of their source of title, and against the municipalities against which an at large assessment was leviable, in an amount sufficient to retire the bonds. By state legislation subsequently enacted, as construed by the state court of last resort, there has been a marked limitation of this duty, as a result of which there can be but a small amount of taxes enforceable, and a very substantial part of the debt represented by the bonds must go unpaid. There is no question as to the existence of the contract, and no question as to its impairment. The only question is as to whether there is some inherent power of state sovereignty which so limits Article I, Section 10, of the Federal Constitution that a state legislature may disregard its command when it considers that public welfare requires it. To date this court has not been willing to construe the contract clause as so limited, and thus we have presented a vital and important question, which ought to be answered by this court.

We, therefore, submit that the motion of appellees should be denied, and further proceedings in the appeal should be permitted.

PAUL W. VOORHIES,
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Counsel for Appellants.

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OCTOBER TERM, 1943

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Petitioners and Appellants,

vs.

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BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

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BRIEF FOR APPELLANTS

REFERENCE TO OFFCIAL REPORT OF OPINION BELOW.

Opinion of the Supreme Court of Michigan is *Keefe et al., v. Clark, Drain Commissioner, et al.*, 306 Mich. 503, 11 N. W. (2) 476 (R. 41). The opinion of the Circuit Court of Oakland County (R. 27) was not officially reported.

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The statute governing the question of jurisdiction is Sec. 344 Sub. a. Title 28 "Judicial Code and Judiciary of the United States" U. S. C. A.; Sec. 237 (a) Title 28 Judicial Code.

The judgment which this Court is asked to review was rendered by the highest court of the state in which a judgment in the case could be rendered. It is a final judgment notwithstanding the fact that the case was remanded (R. 47), for the remand was merely for the purpose of entering the judgment prescribed in the opinion. No question in the case remained undetermined. The fact that the judgment is in this form does not prevent acquisition of jurisdiction. *Board of Commissioners v. Lucas*, 93 U. S. 108, *Mower v. Fletcher*, 114 U. S. 127. *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44. Nor does the fact that the suit was instituted for a declaratory judgment affect the question of jurisdiction. *Nashville Cincinnati & St. Louis Ry. Co. v. Wallace*, 288 U. S. 249.

Appellants claim that error was committed by the lower Court in failing to hold that certain statutes as construed by it are repugnant to Article 1, Sec. 10, of the Constitution of the United States. These statutes are Acts 114 and 155 of Mich. Public Acts of 1937 which have since been clarified by certain amendments. They are more particularly set forth in the statement as to jurisdiction, p. 2 and the provisions construed by the lower court are set forth in its opinion (R. 43). In an appendix hereto, the provisions cited by the lower court, together with some additional portions appear.

The question is one which has often been presented to this and other courts, where the right to a levy of taxes to

pay municipal bonds is modified or curtailed by statutes enacted after the bonds have been issued. Appellants who are holders of bonds issued by a Michigan drain district, under legal provisions which entitle them to a full deficiency assessment which must necessarily be levied if the bonds are to be paid, are confronted with statutes passed ten years after the issuance of the bonds. These statutes, as construed by the lower court, permit the creation of widespread exemptions from deficiency assessments, and limit the amount which can be imposed upon property and parties not exempted, in such a way that only a small fraction of the amount due upon the bonds can be enforced. Thus, the classic case of impairment of obligations of a municipal contract by withdrawing taxing power is presented.

Appellees have moved to dismiss this appeal, and briefs have been filed upon the question. Appellees argue that appellants did not properly preserve the federal question in the lower courts, it being their claim that the impairment of contract obligations springs from Act 114, Mich. Public Acts of 1937, and not from Act 155 of that year, and that the lack of specific mention of Act 114 in the pleadings in the trial court is fatal to appellants' right to review. Appellants' argument against this position is fully stated in their brief opposing the motion to dismiss, but will be treated later as a separate point in this brief.

CONCISE STATEMENT OF THE CASE

On November 1, 1927, East Clawson Storm Sewer Drain District issued $300,000 par value of serial bonds. At the time this suit was filed, June 25, 1942 (R. 2) $223,000 par value of bonds were unpaid and in default as to both principal and interest. Appellants hold a substantial block

of these bonds, and they, with other holders, entered into an arrangement with the drain commissioner, who in Michigan is the governing officer of a drain district, for a refunding of the bonds, with extension of maturities and reduced rate of interest. While a refunding plan was being developed, a ruling by the Michigan Supreme Court in a case involving bonds issued by a village predicated upon special assessments (*Municipal Investors Assn. v. City of Birmingham,* 298 Mich. 314) caused doubt to the extent of properties in the district which would be subject to further assessments for the purpose of paying the refunding bonds (R. 10). The drain commissioner contended that the refunding plan as negotiated could not be carried out, if the ruling of the Birmingham case were applied. That case was then pending in this Court on appeal, and the parties believed that the decision of this Court would determine whether the kind of deficiency assessment necessary to support the bonds could be levied. This Court's opinion, however, was not determinative when considered with relation to these bonds. *Municipal Investors Ass'n. v. Birmingham,* 316 U. S. 153. The drain commissioner then refused to refund the bonds, and in fact denied that there was any obligation to levy any further assessments (R. 24).

Appellants therefore petitioned the Circuit Court of the County to determine whether the drain commissioner and the then Board of Supervisors were obliged to act under the provision of the drain law, in force when their bonds were issued, (and still unrepealed) and levy on all lands in the district not exempt by reason of public ownership, and upon the several municipalities assessed at large, a deficiency assessment sufficient to pay the bonds (R. 6). A subsidiary question presented was whether periodic supplemental assessments against such lands and municipalities

could be made in accordance with the refunding plan as authorized by Act 129, Mich. Public Acts of 1939. Appellants prayed for a determination that all privately owned lands in the district were subject to a deficiency levy and that in any event the amount of such levy must be sufficient to pay the bonds. Appellants in their petition stated their understanding of appellees' position to be that Act 155 Mich. Public Act 1937 and Acts *in pari materia* abrogated or curtailed the provisions which previously had required such assessment, but appellants asserted that if such interpretation were given to the later enacted statute, they were void as to these bondholders because of Art. 1, Sec. 10 of the Federal Constitution (R. 5).

In appellees' answer (R. 25) they asserted that a large portion of the lands originally assessed had reverted to the State for non-payment of taxes, and that the decision of the Michigan Supreme Court in the Birmingham case operated to prevent any further assessment.

At the hearing, it appeared that 65% of the land in the district had been delinquent and had passed to the State (Defendants' Exhibit 2, R. 56, admitted R. 39). Some had been sold by the state and was again privately owned. How much the record did not show (R. 40).

All relief was denied to bondholders by the trial Court (R. 33). The Court considered itself bound by the Birmingham case to hold that "Lands sold under Act 155 of Public Acts 1937, as amended, are not subject to a deficiency re-assessment. Under this holding 65% of the lands of the district are lost to the possibility of reassessment" (R. 31). The trial court's opinion makes no mention of Act 114, Michigan Public Act 1937. Appellants appealed from the judgment claiming that the trial court erred in denying the petition, and in his rulings that land which had been sold under Act 155 of Michigan Public Act

1937 were exempt from an additional deficiency assessment (R. 1).

The opinion of the Supreme Court of the State (R. 40) contains a fairly accurate statement of the facts and the contentions of the parties. It showed that appellants raised the question of whether any statute passed subsequent to the issuance of the bonds, which would deprive them of the right to a full deficiency assessment, could be valid under Art. 1, Sec. 10, of the Federal Constitution (R. 42). The opinion notes the provisions of the drain law requiring the deficiency assessment, the provisions which require that drain taxes be enforced as ordinary real estate taxes and the provision of Sec. 67, 1 Comp. Laws 1929, Sec. 3459, as last amended by Act No. 234, Public Acts, 1941, relating to the decree to be entered in connection with the order to sell lands for delinquent taxes. The provision as quoted was the addition to Sec. 3459, Compiled Laws 1929, Sec. 7.112 Mich. Stats. Ann., enacted in Act 114, Michigan Public Act 1937. It then proceeds to quote from Act 155 as to the effect of the quit claim deed. It disposes of appellants' argument on the proposition that the obligation of contracts has been impaired by saying that such impairment is justified by necessity (R. 45).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

All errors assigned (R. 52) are urged by appellants. These may be more replete than necessary, but were stated in the form so as to cover various aspects of the question. For the purpose of this brief, they may be condensed to the following:

The contract clause of the federal constitution (Article 1, Sec. 10) prohibits the enactment of laws which substantially remove tax resources for the payment of municipal bonds. Laws enacted subsequent to the issuance of such bonds, which, either by the creation of widespread tax exemption, or by the limitation of tax liability, prevent the creditor from realizing upon his contract, come within the prohibition. The lower court, while recognizing the impairment of the creditors' contract by subsequent legislation, erred in holding such impairment to be justified on the ground of expediency.

ARGUMENT

Summary of Points

1. This Court has jurisdiction.—Analysis of the lower court's opinion, we believe, shows that it considered Act 155, Michigan Public Act 1937, as the enactment which prevents full realization of rights guaranteed by the provisions of the drain law in respect to deficiency assessments. But if we misinterpret the opinion, it is of no consequence, so far as the question of this court's jurisdiction is concerned, for it is clear that the lower court considered that subsequently enacted statutes limited bondholders' rights, that appellants contended that such statutes operated to impair their contract rights, and that this was a violation of the contract clause of the federal constitution.

2. The obligation of contracts has in this case been impaired.—Were it not for legislative enactment passed long after these bonds were issued, all privately owned lands in the district and the municipalities taxed at large, would be subject to a deficiency assessment in an amount sufficient to pay the bonds.

3. State laws impairing contract obligations may not be justified on the ground of expediency.

1. THIS COURT HAS JURISDICTION

The only proposition that is urged by appellees against the court's jurisdiction is the claim that the impairment of contract results from Act 114, Michigan Public Acts, 1937, and not Act 155 of the same year. We think the Michigan Supreme Court ascribes to the latter act the change in legislation which sustains the defense, and it is

logical that it should, once it has arrived at the conclusion that the possibility of a reassessment for deficiencies constitutes an incumbrance.

Appellants have never contended that land whose title has absolutely vested in the state is subject to a tax while the State owns it. We recognize that state property is exempt, and that taxes for any purpose can only be levied upon lands which are privately owned. Our contention throughout the litigation has been that when the state conveys the land to either the former owner or another it then becomes subject to any tax which the legislature has provided should be levied; and that if the laws were such when the bonds were issued, temporary ownership by the state confers no permanent exempt status, and a subsequent change in those laws is invalid as against creditors who seek to have such taxes enforced. All that we ask is that a holder of a drain district bond should have the same right as the holder of a bond of any other municipality. No one contends that temporary ownership by the state through the operation of tax laws discharges a parcel of land within a school district, a city or township, from liability for taxation to meet municipal obligations previously incurred. Apparently, under the court's ruling, it is only with respect to drain district bonds that this happens. It can only happen because some law relating to the transfer of title out of the state, either directly or by judicial interpretation, confers the exemption.

But if we have misinterpreted the lower court's opinion, and if our logic is faulty in regard to Act 155 being the legislation which confers the exemption, it can make no difference. The lower court has certainly held that some law passed in 1937 confers the exemption and deprives bondholders of rights which they were promised when they

bought the bonds. It has recognized that a constitutional question has been raised, and it has decided such question adverse to the federal claim submitted by appellants. No clearer answer can be given to the appellees' contention than the language of this court in *State of Montana v. Rice*, 204 U. S. 291, 299, reading as follows:

> "Where it clearly and unmistakably appears from the opinion of the State Court under review that a federal question was assumed by the highest court of the State to be in issue, was actually decided against the federal claim and the decision was essential to the judgment rendered, it is sufficient to give this court authority to re-examine the question on writ of error."

Other decisions of like effect are cited pp. 9 and 10 of our brief opposing the motion to dismiss.

It must be remembered that the federal claim in this case arises as a rebuttal to a defense, and hence came into the argument when the case was before the state supreme court.

Appellants' petition asked that the laws existing when their bonds were issued be enforced. Appellees contended that such laws had been changed, so that appellant no longer had the right which they sought to have enforced. Appellants then countered with the claim that the change was repugnant to the Federal Constitution.

Under these circumstances, it is immaterial to consider anything other than the lower court's opinion.

> *San Jose L. & W. Co. v. San Jose Ranch Co.*, 189 U. S. 177.

A refusal of this court to take jurisdiction would be tantamount to saying that a litigant must, when he starts this suit, anticipate the view of the court of last resort, and

so shape his pleadings, proceedings and exceptions that the record throughout must present the precise federal question which was ultimately decided. Such a requirement would prevent this court from serving the function assigned to it by Congress as the protector of rights guaranteed by the Federal Constitution against erroneous judgments by state courts.

2. THE OBLIGATION OF APPELLANTS' CONTRACTS IS IMPAIRED.

Nothing is better settled in the law relating to public securities than the proposition that the statute authorizing a bond issue enters into and forms a part of the contract. No one would buy a public security without assurance contained in the law of the sources of revenues to be devoted to its payment. The plan provided for raising the funds is as much a part of the promise as the undertaking to repay the sum borrowed.

The statutes under which these bonds were issued, recited in the bonds (R. 7, 8) show that drain districts are organized for the purpose of building and maintaining drainage improvements. In the course of proceedings the cost of the proposed project is determined, and the proportion which each parcel of land and each municipality to be taxed at large shall be assessed. An assessment roll is prepared and confirmed, in which the assessment against each is designated. Upon confirmation of the roll the assessments become liens declared to be perpetual until they are paid, with all lawful interest, costs and charges. (Section 5, Ch. X, Act 316 Mich. Public Acts 1923, Section 4923 Mich. C. L. 1929.) The drain commissioner who conducts the proceedings may determine that the assessments may be divided into annual installments, to be collected with interest from date of the original assessment. The

taxpayer may, if he so desires, pay the entire assessment, or may pay in installments. (Section 4939 Mich. C. L. 1929.) The installments are placed on the annual tax rolls and collected as ordinary real estate taxes, and if not paid become delinquent and subject to the same proceedings for enforcement as such taxes.

Bonds may be issued in the name of the district in anticipation of the collection of installments, (Section 4937 Mich. C. L. 1929) and in such bonds the commissioner, in behalf of the district, is directed to pledge the full faith and credit of the district, the lands included, and the municipalities taxed at large.

If all assessments are paid on the installment basis promptly as the installments fall due, the bonds will be liquidated, for the interest on the installments pays the interest on the bonds. But if a number of taxpayers pay in full, or if some taxes cannot be collected, there will be a deficiency and the law has always provided substantially as set forth in Section 4940, Mich. C. L. 1929, quoted in the opinion (R. 42), that an additional deficiency assessment shall be levied. By reference back to a prior section (4917), it appears that this must be levied on the same percentage basis, and without any further hearing or review. If as a result of this assessment a surplus is collected, it is credited to the drain fund and used for maintenance.

By an amendment to Section 4940, enacted in Act 129, Michigan Public Acts 1939, a provision was added which permitted the levy of the deficiency in periodic amounts, as determined to be necessary, in case bonds were refunded. The refunding plan proposed and accepted provided for such periodic assessments of the deficiency. (Section 11, Drain Commissioner's Order, R. 17.) Thus there is a plain duty imposed upon the commissioner to levy an addi-

tional assessment when there is a deficiency and the bonds are all due, and if he can get bondholders to agree to a refunding he may provide for such levy periodically as needed. In this case the bondholders are willing to accept refunding bonds, and the periodic deficiency levies provided in the plan, but insist that if respondents are unwilling to carry it out, the bondholders are entitled to the single deficiency assessment as required in Section 4940, re-enacted in Act 129, Michigan Public Acts 1939.

There is no question in this case as to the meaning of Section 4940, or the existence of the conditions calling for its application. The lower court recognizes that it requires a deficiency assessment against lands which have not gone through the scavenger sale, and against municipalities taxed at large, and for this reason modified the judgment of the Circuit Court. In a prior decision, *Regents v. Pray*, 264 Mich. 693, the court recognized the duty of the commissioner to levy such additional assessment. Appellants in this case cannot be confronted with the proposition on which the Birmingham case was decided in this court. The contract existed and the only question is whether it has been impaired. Appellees and the lower court concede that if it were not for legislation enacted in 1937, the petition would have been sustained.

We know that this court takes a practical view of cases of this kind and desires to know whether substantial rights, or merely theories, are involved. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U. S. 502. It may, therefore, be desirous of knowing how different is the situation of appellants and other bondholders than that which would have existed had there been no 1937 legislation. The question may be asked, "Was it possible under the law as it existed when these bonds were issued for privately owned lands in the district to be exempt from

deficiency levies?" To answer this question we refer to the appendix of this brief, in which we have set forth in as much detail as is pertinent the statutes relating to tax enforcement procedure as they existed when the bonds were issued. A parcel of land on which the owner neglected or refused to pay taxes, which could not be sold for taxes, might after a period of five years be taken over by the state as abandoned land, but when the state conveyed it, it would again be subject to any taxes which might be levied against it. (See Sections 7.181, 7.182 and 7.185 Appendix.) While in the hands of the state it would be exempt, and all prior liens and encumbrances cancelled, but as soon as it passed again into private ownership new taxes for any lawful purpose could be levied against it. The only taxes cancelled against it were those charged against it on the books of the Auditor General, and as the only taxes which could be so charged were those which had been previously levied and returned delinquent there could be no exemption from future levies.

If only the language of the statutes is considered, the changes which occurred in 1937 do not appear very serious so far as bondholders are concerned. It is only by judicial interpretation that they take on this aspect. By virtue of interpretation, based rather upon a consideration of the presumed policy of the legislature than any language used, the 1937 legislation is deemed the equivalent of an express prohibition against the levy of any deficiency drain assessment against a parcel of land in a drain district which has gone through the scavenger sale. The court in this case, and in the prior Birmingham decision, interprets the word "encumbrance" used in the quit claim deed provision of Act 155 and the decree provision of Act 114, as broad enough to include a potential liability to a tax which never has been imposed. The fact that there is a

drain district debt, the possibility of a deficiency, and the obligation on the part of the commissioner some time in the future to levy an additional tax, is regarded as an encumbrance. Hence it is said, when the legislature said that all encumbrances should be cancelled it was destroying the possibility of a further assessment and creating an exempt status for these lands against any further tax which might be imposed to meet the prior existing debt.

Although we contended below that such a construction of the term "encumbrance" was erroneous, citing prior Michigan decisions, *Harriman v. Hilliard*, 27 Mich. 271, *White v. Gibson*, 146 Mich. 547, *Jacobs v. Union Trust Co.*, 155 Mich. 233, and *Mullen Benevolent Corp. v. U. S.*, 290 U. S. 89, we were overruled.

We seriously doubt whether the members of the legislature or the governor who approved this legislation could have anticipated this broad construction of the term "encumbrance." Until the Birmingham case was decided it was not the view of opposing counsel, for in a brief filed in the Supreme Court of the State in *Baker v. State Land Office Board*, 294 Mich. 587, he argued that there was no impairment of contract. On page 7 of his brief he said:

> "How are the bondholders injured? Such districts are liable for a deficiency spread of taxes and the rehabilitation of the properties sold at scavenger sale makes them liable for this deficiency spread * * *. The lien on particular property in the district has been foreclosed and liquidated at less than its face value, but if and when a deficiency is incurred as a result of such foreclosure and liquidation, such property is subject to deficiency assessments. It is the intent of the law that all property in the district reach its way into private hands as quickly as it may be sold. Only temporarily, if at all, is any property removed from the possibility of deficiency assessments."

The foregoing observations as to the unexpected construction of the term "encumbrances" we recognize are explanatory rather than argumentative. We believe it of some importance to note that a deliberate intent to impair contract obligations is not manifest, and that it is only by reason of judicial interpretation that the statutes under consideration have this effect.

Another practical question may be raised as a result of some of the observations of the lower court, particularly the statement, "We cannot, therefore, say that the bondholders' contract has been impaired when they received the maximum benefit under the circumstances." This requires some discussion: These observations have no support in any allegations or proofs in the record. The court merely assume that such amounts as may ultimately come into the treasury of the district as a result of a scavenger sale are the maximum that could ever be realized from lands on which there had been a refusal or neglect to pay taxes. The provisions in regard to a scavenger sale contained in the State Land Office Board Act, Act 155 Michigan Public Acts 1937, (see appendix) permits a sale at a price equal to 25% of the assessed valuation at the time of the vesting of title in the state. As lands delinquent for drain taxes are usually delinquent for general taxes, and often the accumulated delinquencies far exceed assessed valuations, (*Baker v. State Land Office Board*, 294 Mich. 587) the amount for which the land is sold may be far less than the accumulated taxes. Whatever is received, less some expense deductions, is apportioned among the taxing units in proportion to the tax liens that have been cancelled. Inasmuch as no deficiency assessment has ever been levied, and therefore no lien has been created, the drain district receives no percentage of the proceeds of the scavenger sale to apply against a

future deficiency assessment. In fact, there would be no way to compute such percentage without knowing how much of a deficiency assessment would in the future be levied. To illustrate, we may suppose that a parcel of land has an assessed valuation of $1000.00. The accumulated tax liens amount to $800.00, half of which are the unpaid drain assessment for past delinquency. The land can be sold for $250.00. The deductions amount to $10.00, leaving $240.00 to be distributed to the taxing units. The drain district gets a little less than one-half of the sale price, and the remainder is distributed to the other taxing units, *e.g.*, the state, county, township and school district. It loses slightly more than $275.00.

We may assume that the bid of $250.00 reflects the market value of the land at the time it is sold, and that it is desirable to get the land into the hands of someone who will develop it and who will pay taxes on it in the future, We may also assume that $250.00 will more readily be bid if there is an assurance that the land will be exempt from some future taxes. The law as interpreted is oppressive against holders of bonds of a drain district, because they are singled out to bear the burden in order to get the lands back on the tax rolls. The county, township and school district also have bonded indebtednesses which must be paid from future debt service levies. The land which has been sold for $250.00 is again placed on the tax rolls, and subject to such taxes as these units may levy. They must each year levy some taxes upon this land to provide debt service. Such future levies are not cancelled by anything that has happened as a result of the operation of the legislation of 1937.

Holders of municipal bonds do not take them with any idea that at some time while they are unpaid the property subject to taxation may be freed from future liability by

paying some amount which can be determined from an auction sale. There must in the nature of things be periods of depression when land values are depressed far below real worth. This fact is recognized in *Home Building and Loan Ass'n. v. Blaisdell,* 290 U. S. 398, as the justification for the mortgage moratorium law there considered. A bondholder has the right to look to future improvement and development, just as a private creditor has a right to look to future earnings and prosperity of his debtor.

That the legislation, under the lower court's interpretation, works to the serious disadvantage of bondholders, is apparent in the comment of the district's refunding agent, Mr. Carey, (Ex. 2 to Petition, R. 10) in the letter to bondholders proposing the acceptance of the refunding plan. A radical alteration of the plan will be necessary if resources from lands which have passed through the scavenger sale are lost to the district. If the right to additional assessments against such lands is sustained, then the plan to refund the bonds par for par, and the issuance of certificates of indebtedness to refund unpaid interest, is deemed "a matter of sound municipal financing." (Order of Drain Commissioner, R. 13.) With 65% of the district exempt from deficiency assessments, and the remainder limited to the amount which would be levied if there were no exemptions, the bondholders are forced to absorb the loss occasioned by such exemption. But if there is no such exemption there is every reason to suppose that the debt can be discharged in due time. This district lies in a well developed section of the state, within a short distance of the City of Detroit, and will not revert to wilderness. The debt of $300,000.00 created in 1927 was not thought too excessive to be paid off in ten years, and while the intervening depression showed this to be a mis-

calculation, it can be met without difficulty if sufficient time is given.

Another effect of the decision on the exemption question which adds to the bondholders' loss is that it prevents them from securing payment from the remaining lands and the governmental units assessed at large. Whether they would be able to pay the debt if the whole burden should be imposed upon them cannot be known, but by reason of the lower court's opinion on the main point these tax resources are seriously depleted. The lower court held that, if the entire amount were imposed upon these lands and municipalities, it would violate the uniformity clause of the Constitution (R. 46), meaning, no doubt, the State Constitution. As this is not a federal question, it is not reviewable here, although we fail to see the connection between the liability of these lands and municipalities and such uniformity clause.

The net result of the decision is that bondholders at best can receive but a small portion of the amount due on their bonds, unless perchance they are able to enforce payment out of the county's general fund. This is an uncertain resource, as bondholders' chance of recovery is dependent upon finding sufficient in the general fund at a time when the advancement will not cause the county to exceed the debt limit. *Regents v. Pray,* 264 Mich. 693. The county is not an unqualified guarantor of payment, and it can defeat recovery from it by keeping its general fund depleted.

Having established the fact that the legislation of 1937, as construed by the lower court, works substantial injury to appellants, we will consider the applicable legal principles. *Von Hoffman v. City of Quincy,* 4 Wall. 535, expresses the principles that have always been followed by this court. At the time of the issuance of bonds there

under consideration there was no legal limit upon the taxes which the city could impose. Subsequent legislation imposed a limit at an amount barely sufficient to provide operating expenses, leaving no amount which could be levied for debt service. The court said:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which effect its validity, construction, discharge and enforcement. * * * Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. * * * No attempt has been made to fix definitely the line between alterations of the remedy, which are deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result mentioned is produced the act is within the prohibition of the Constitution, and to that extent void.
>
> "The obligation of the contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of

> the contract, the obligation of the latter is to that extent weakened. * * * When a state has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound."

In *Seibert v. Lewis,* 122 U. S. 284, the question before this court was whether a judgment creditor of a municipality was entitled to have enforced laws relating to the collection of taxes existing when the debt was incurred, or laws which subsequently were enacted and which the court found were less efficacious in producing the funds necessary to pay the judgment.

The court concluded its opinion thus:

> "For the reasons which we have pointed out, we are unable to concur in the judgment of the Supreme Court of Missouri, and are constrained to hold that the section of the Revised Statutes in question impairs the obligations of the contract with the relator under the act of March 23, 1868, and as to him are, therefore, null and void by force of the Constitution of the United States; and that the laws of Missouri for the collection of the tax necessary to pay the judgment, in force at the time when it was rendered, continue to be and are still in force for that purpose. They are the laws of the state which are applicable to this case. When he seeks and obtains the writ of mandamus from the Circuit Court of the United States, for the purpose of levying tax for the payment of the judgment which it has rendered in his favor, he asks and obtains only the enforcement of the laws of Missouri under which his rights became vested, and which are preserved for his benefit by the Constitution of the United States. The question, therefore, is not whether a

tax shall be levied in Missouri without the authority of its law, but which of the several of its laws are in force and govern the case."

In *Louisiana v. Pillsbury*, 105 U. S. 278, is the following:

> "Legislation of a state thus impairing the obligation of contracts made under its authority is null and void, and the courts in enforcing the contracts will pursue the same course, and apply the same remedies, as though such invalid legislation had never existed."

In *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56, the last case decided by this court on this question, a much less serious case of impairment than the present case was presented. The most that could be said of the legislation in question was that it retarded and delayed creditors, without clearly voiding any part of the debt. The court said:

> "Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he has every incentive to refuse to pay a dollar, either for interest or for principal. * * * Relief is not conditioned upon payment of interest and taxes or the rental value of the premises. The case is one of postponement for a term of years, with undisturbed possession for the debtor and without a dollar for the creditor. There is not even a requirement that the debtor satisfy the court of his inability to pay."

Recognizing that a state may regulate remedies, the court nevertheless pointed to a distinction, saying:

> "A different situation is presented when extensions are so piled up as to make the remedy a shadow. * * * What controls our judgment at

> such times is the underlying reality, rather than the form of the label. The changes of remedy now challenged as invalid are to be viewed in combination with the cumulative significance that each imparts to all. So viewed, they are seen to be an oppressive and unecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."

This decision contains citations of all prior decisions on the subject. Space will not permit a detailed consideration of each, but we believe the court will find them fully sustaining the proposition which we assert.

Following the lead of this court lower federal courts and the state courts have on most occasions been diligent in striking down legislation which prevented the enforcement of municipal debts through changes in taxing statutes.

The Michigan Supreme Court in prior opinions has several times adhered to the views expressed by this court. In *Board of Education of Lincoln Park v. Board of Education of City of Detroit,* 245 Mich. 411, it held unconstitutional a statute which detached a portion of a school district and added it to another district, making the former district responsible for the bonded indebtedness. A little analysis will demonstrate the similarity between that situation and the one presented here. By exempting certain lands from debt service taxes in this district, they are effectually detached so far as the corporate obligations are involved, although they still enjoy the benefits produced by the drainage improvement.

In *Thompson v. Auditor General,* 261 Mich. 624, the court reviewed the underlying reasons which caused the framers of the constitution to incorporate the contract clause. It said:

"Any legislation which renders the remedy of the stockholders less effective or less convenient, or which changes their remedy or takes it away, impairs the obligation of their contract, unless a remedy substantially as efficacious remains. It is not a question of the degree of the impairment; the least is as much prohibited as the greatest."

Florida decisions growing out of the adoption of a constitutional amendment exempting homesteads up to $5000 from taxes contain a voluminous discussion of the right of a state to exempt property from taxes needed to pay public debts. The court held that even a constitutional amendment could not create exemptions from such taxes, and that the amendment was valid only to the extent that it exempted such homesteads from operation levies and debt service levies for new bond issues.

Gray v. Moss, 115 Fla. 701, 156 So. 262;
State ex rel. Long v. Carey, 121 Fla. 515, 164 So. 199;
Boatright v. City of Jacksonville, 117 Fla. 477, 158 So. 42;
Folks v. Marion County, 121 Fla. 17, 163 So. 298;
State v. Port of West Palm Beach, 121 Fla. 746, 164 So. 851;
State v. Boring, 121 Fla. 781, 164 So. 859;
State v. City of Daytona Beach, 118 Fla. 773, 160 So. 501;
Fleming v. Turner, 122 Fla. 200, 165 So. 353;
Long v. St. John, 126 Fla. 1, 170 So. 317, 109 A. L. R. 522;
Groves v. Board of Education, 109 F. (2) 522.

In some of these cases the court considered the contention that a state may always provide exemptions, and the creditor takes his chance of having the security of his obligations frittered away by this means. The court considered two decisions of this court advanced in support of this doctrine, *Gilman v. Sheboygan*, 2 Black (U. S.) 510, 17 L. Ed. 305, and *Arkansas S. R. Co. v. Louisiana & A. R. Co.*, 218 U. S. 431, but distinguished them. Although this court did in those cases permit after enacted legislation creating exemptions to stand, it is clear that the decisions were limited to the peculiar facts in each case. In *Gilman v. Sheboygan* the law had been changed to limit the tax resources to real property alone. A property owner claimed that this deprived him of constitutional rights. Although he argued that bondholders were injured by this subsequent legislation, the court refused to consider the point since bondholders were not before the court. In the other case a parish had been authorized to vote a tax of 5 mills per dollar for a period of ten years on all its taxable property, to be paid to a railroad company. A subsequently enacted statute exempted from parish taxes the property of another railroad company. The court said:

> "An authority given by the state to promise and levy a tax in future years on the taxable property in the parish does not purport to limit the powers of the state to say what property shall be taxable when the times comes * * * at least by general regulations not aimed at aiding an evasion of the promise it has allowed."

The last qualifying clause is significant. It also is important to note that the parish had made no promise of a specific sum. It merely agreed to levy five mills per dollar and turn the amount received over to the company for a term of ten years.

The Florida decisions we believe contain the rule applicable here, *i. e.*, that, after municipal debts predicated upon the exertion of local taxing power are created, the taxing power cannot be so reduced as to prevent the payment of such debts. Legislation having such effect is void as to creditors under the contract clause of the constitution.

3. STATE LAWS IMPAIRING CONTRACT OBLIGATIONS MAY NOT BE JUSTIFIED ON THE GROUNDS OF EXPEDIENCY.

The decision of the lower court with its reference to the Birmingham case, and *Baker v. State Land Office Board*, 294 Mich. 587, in plain language sustains the proposition that a state legislature in the interest of the public may cancel debts.

We grant that a serious situation existed as a result of the depression, and that the state was not prevented by the Federal Constitution from changing tax enforcement laws so as to accelerate the date upon which a delinquent taxpayer would lose his property, and that the state, after its acquisition, could sell the property at the price it deemed advisable. Our objection is aimed at the creation of a tax exemption in connection with such sale, and through such exemption the destruction of prior contracts.

The legislation, as pointed out before, construed as it is by the lower court, single out only one type of public debt for destruction, but if this may be done constitutionally there is no limit to the extent to which it may be carried. If the lower court is sustained, there is no constitutional bar to saying that any property which has gone through a scavenger sale shall be exempt from debt service levies for any pre-existing municipal debt. All the property owners of a city, by the simple expedient of refusing to

pay their taxes and letting their property go to a scavenger sale, can free all of the property from the duty of contributing to the discharge of debts, and leave the creditors with worthless securities.

The genesis of the contract clause of the Federal Constitution is ably related by Mr. Justice Sutherland in his dissenting opinion in *Home Building and Loan Ass'n. v. Blaisdell,* 290 U. S. 398, and while the majority of the court disagreed with his ultimate conclusion, it did not criticize his analysis of the reasons which led to the incorporation of that clause in the organic law.

Intolerable conditions, stifling trade and commerce and promoting disunity, existed in the thirteen original states because of the passage of laws impairing contract rights. Recognition of the possible necessity of some governmental action to permit such impairment was given by the power conferred upon Congress to enact bankruptcy laws. A clear intent was manifested that this power might with greater safety be entrusted to the national government.

Congress permits taxing districts such as this to adjust their debts through bankruptcy proceedings. They are thus not without a source of relief, where the conditions warrant. There is thus no evidence of compelling necessity in the public interest, justifying the statutes in question as they have been construed. The absence of such public necessity is quite apparent when the discrimination against this type of public creditor is considered, for as noted above, no attempt is made to relieve lands which have gone through scravenger sales from future debt service levies on account of bonds previously issued by other municipalities.

The lower court's position can only be explained by what seems to us to be an erroneous conception of this

court's decision in the Blaisdell case. It failed to note the limitations on the doctrine of that case which this court carefully embodied in its opinion, and which it has since reiterated in *W. B. Worthen Co. v. Thomas,* 292 U. S. 426, and *Worthen v. Kavanaugh (supra).* In speaking of the reserved power of the states upon which the decision in the Blaisdell case was planted, this court, in *Worthen Co. v. Thomas,* said that "it must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit a state to adopt as its policy the repudiation of debts, or the destruction of contracts, or the denial of the means to enforce them. We held that when the exercise of the reserved power of the state, in order to meet public need because of pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency * * *." The court noted that in placing insurance money "beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances or need."

The recent decision of *Faitoute Iron and Steel Co. v. Asbury Park,* 316 U. S. 502, is in harmony with the two Worthen cases, for the statute there involved carefully safeguarded creditor rights and was as much intended for their benefit as for the benefit of debt burdened municipalities.

We, therefore, believe it apparent that the Michigan Supreme Court has misinterpreted the Blaisdell case, as the Supreme Court of Arkansas misinterpreted it when *Worthen v. Kavanaugh (supra)* was before it.

CONCLUSION

We respectfully submit that the lower court erred in overruling appellants' contention that Acts 114 and 155, Michigan Public Acts 1937, as amended, either severally or in combination, as construed by the lower court, violate Article I, Section 10 of the Federal Constitution, and as to appellants are invalid. They do not, in our opinion, afford justification for the position taken by the lower court. We, therefore, ask that the judgment be reversed and that the case be remanded for correction.

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APPENDIX

Portions of Michigan General Tax Laws Relating to Enforcement of Delinquent Taxes on Real Property

The most convenient compilation of Michigan Statutes relating to enforcement of delinquent taxes on real property is Michigan Statutes Annotated, Vol. 6, with its cumulative supplement for 1943. The references herein are to that compilation unless otherwise indicated. Before each quotation is the Section of Title 7, and after each quotation is the page in Vol. 6 on which it is found. Cumulative supplement will be indicated by "C. S."

Portions of the statutes as they existed in 1927 when the bonds in question were issued will first be given.

7.1 "That all property, real and personal, within the jurisdiction of the state not expressly exempted shall be subject to taxation." (7)

7.7 "The following real property shall be exempt from taxation:

Federal. First, all public property belonging to the United States;

State. Second. All public property belonging to the State of Michigan, except licensed homestead lands held under certificates, and lands purchased at tax sales and still held by the state.

Public Buildings. Third. Lands owned by any county, township, city, village or school district and buildings thereon used for public purposes." (18)

Several other classifications are exempt, such as lands held for churches, charitable, education or scientific insti-

tutions. While these are exempt from general taxes, they are subject to benefit assessments. *In re Auditor General's Petition*, 300 Mich. 80.

No substantial express amendments to the exemption laws, in so far as the questions involved here are concerned, have been made since 1927.

Enforcement of delinquent taxes through tax sales may result in the lands being sold to a person who bids the amount of the delinquent taxes, or to the State, in which case no money is paid by the state. We are only concerned with the question of lands bid in by the state, for otherwise money is obtained equivalent to the amount assessed. We can best consider this by tracing what becomes of a parcel of land upon which the owner fails to pay taxes, and which is bid in by the state. In 1927 and prior years, the procedure was as follows:

> 7.99 "If the township treasurer or other collecting officer shall be unable to collect any of the taxes in his roll, assessed on real property, he shall make a duplicate statement of the same. * * *" (192)
>
> 7.101 "When any county treasurer shall receive from a township treasurer a statement of unpaid taxes together with a list of the lands on which same are delinquent * * * such county treasurer shall enter the same at length on the books in his office, * * * and he shall make a transcript of all the descriptions of land returned as delinquent for unpaid taxes * * *. Such transcript * * * shall be forwarded to the auditor general * * *." (197)
>
> 7.104 "All lands which have been or may be returned to the auditor general as delinquent * * * shall be subject to disposition, sale and redemption for the enforcement and collection of such tax liens in the method and manner as hereinafter provided. In the disposition and sale of such delinquent tax lands the people of the State of Michigan shall be

deemed to have a valid lien upon such lands, with all the rights to enforce same as a preferred or first claim upon such lands, and the rights and choses to enforce such lien shall be held and construed by all the Courts of this State as the *prima facie* right of the state, and shall not be set aside or annulled except in the manner and for the causes herein specified.". (205)

7.105 "In sufficient time before the time fixed herein for the annual tax sale, the auditor general shall prepare and file in the office of the county clerk in each county in which lands are to be sold under the provision of this act a petition addressed to the Circuit Court for said county in chancery, stating therein by apt reference to lists or schedules annexed thereto a description of all lands in such county upon which taxes have remained unpaid for more than one (1) year after they were returned as delinquent" (with interest, penalties,—collection fees) "such petition shall pray a decree in favor of the State of Michigan against said land for the several amounts so specified therein, and on default thereof, that such lands be sold. * * *" (207) Subsequent provisions provide for notice, publication, hearing.

7.111 "* * * At least ten (10) days prior to the time fixed for the sale of such lands, the court shall make a final decree in favor of the State of Michigan for such taxes, interest and charges as shall be valid, and determine the total amount thereof chargeable against each parcel of land, and shall order a decree that such several parcels of land or so much of each as may be necessary to satisfy the amounts fixed by such decree, shall be sold as the law directs." (221)

7.112 "Such final decree * * * shall be substantially in the following form." (Recitals.) "It is ordered, adjudged and decreed that the amount of taxes, interest, collection fee and charges set down in the column headed 'Amounts decreed

against lands' in the Tax Record of which said petition forms a part, are valid and decree is made in favor of the State of Michigan, therefor against each parcel of said land for the amount set down in said column opposite to such parcel. It is further ordered * * * that said several parcels of land or such interests therein as may be necessary to satisfy the amounts herein decreed against same, shall be severally sold as the law directs on" (date specified). (233)

7.115 (Directions as to conduct of sale) * * * "If any parcel of land cannot be sold for taxes, interest and charges, such parcel may be passed over for the time being and shall on the succeeding day, or before the close of resale be reoffered; and if on such second (2nd) offer, or during such sale, the same cannot be sold for the amount aforesaid, the county treasurer shall bid off the same in the name of the state for the state, county and township in proportion to the taxes, interest and charges due each. And in such case, the taxes assessed on the lands so bid off to the state, and the interest and charges thereon, shall remain a lien upon said lands and any person or persons may thereafter purchase such lands of the state, as state tax lands or otherwise as provided in this act. * * * All lands bid off in the name of the state shall continue liable to be taxed in the same manner as if they were not the property of the state, except as hereinafter provided. * * *" (241)

7.132 "All lands heretofore or that may be hereafter bid off to the state for taxes which have not been redeemed or otherwise disposed of shall be offered for sale by the county treasurer at the regular annual tax sale provided to be held under the provisions of this Act. * * *" (289) (This section was repealed. Mich. Public Acts 1937, No. 325.)

7.139 "Neither the sale of state tax lands, nor the sale of any of the bids of the state for which

the time of redemption has not expired, shall in anywise prejudice the right to enforce the collection of any tax subsequent to the year or years for which the same has been sold as aforesaid, and for the taxes and charges remaining unpaid for said subsequent year, or years, the auditor general shall cause such lands to be offered in regular succession at the next annual sale for taxes, giving notice as required by law, unless previously redeemed or otherwise discharged." (299)

7.181. "Lands delinquent for taxes for any five (5) years, where said lands have been sold and bid off to the state for the taxes of one (1) or more of the said years, and then so held and no application having been made to pay, purchase or redeem the said lands for said taxes, and no action pending to set aside such taxes or to remove the cloud occasioned thereby, shall within the meaning of this act be deemed abandoned lands, unless such lands are actually occupied by the person having the record title thereto. Any lands delinquent for taxes for a period of five (5) or more years, and said lands having been sold and bid in by the State and held by the state for the taxes of any of said years, and no application having been made to pay, redeem or purchase the same, and no suit tending to set aside said taxes or remove the cloud from the title occasioned thereby, shall be subject to the provisions of this section. Whenever it shall appear by the records in the auditor general's office that any lands are delinquent for taxes for five (5) years or more and that said lands have been bid off to the State one (1) or more times by reason of such delinquent taxes, and the time of redemption of such sale or sales has expired and no application has been made to pay, to redeem or purchase the same and it shall appear that no action is pending in the Circuit Court of the county where said lands are situated to set aside the taxes or remove the cloud on the title occasioned thereby, the title to the state shall be deemed absolute in and to said lands * * *

Within ninety (90) days after such determination the auditor general shall make a transfer by deed of all lands so determined by the auditor general and said director of conservation to come within the provisions of this section to * * * the state of Michigan as to an individual as provided in section seventy-two (72) of this act, so far as said section is applicable, and such lands may be withdrawn from sale pending the execution of said deed." (358, 359)

(Note: The reference to section seventy-two (72) relates to the form of deed given to the holder of a certificate of sale.)

7.182 "When a description of land is delinquent for taxes for any five (5) years, and said lands have been sold and bid off to the state for taxes of one (1) or more of said years and then so held and is otherwise subject to transfer by deed to the Public Domain Commission as provided by the preceding section, and said land or any part of the same is also held as state tax land or as state bid for taxes of one (1) or more years, with other descriptions of land that are not delinquent for taxes of five (5) or more years, the Auditor General may transfer by deed to the Public Domain Commission these particular descriptions of land that are otherwise subject to the provisions of section one hundred twenty-seven (127) of this Act." (364) (Note: Section 127 is the preceding section.)

7.185 "All taxes charged against such lands in the office of the auditor general at the time they are deeded to the state shall be cancelled, but no part of such taxes due to the township or county shall be charged to the state, but the state, county and township respectively, shall bear the share of the loss on such taxes that properly belongs to each * * *,"— A list of such lands must be transmitted to the county treasurer and by him to the township supervisor.—"The supervisor shall omit and cancel from

his assessment roll all lands so deeded to the state as shown by said list * * *, and said lands so deeded as aforesaid shall not be liable to any assessment for any purpose until the same are again sold and deeded by the state and notice of said sale and deeding given to the county treasurer by the commissioner of the state land office, as hereinafter provided." (365)

Laws enacted in 1937, which changed provisions in relation to the enforcement of delinquent taxes are as follows:

7.112 C. S. This is part of Act 114, Mich. Public Acts, 1937, with subsequent amendments clarifying same. The pertinent provision is the addition of the following to the prescribed form of decree.

"It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale and which parcel of land is bid in at such sale to the state, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes, special assessments, which are charged against or are liens upon such parcels and other liens and encumbrances against such parcel of whatever kind or nature shall be cancelled as of such date, unless any said parcel of land shall be redeemed as provided in Section 74 of Act 206 of Public Act of 1893, as amended, or unless an appeal shall have been taken as provided in said act." C. S. p. 56.

Following the prescribed form of the decree the section provides:

"Unless sooner redeemed, upon the expiration of such period of redemption provided for in Section 74 of this act absolute title to the lands so sold and bid in to the state shall vest in the State of Michigan as provided in said decree." (57)

The State Land Office Board Act, Act 155, Mich. Public Acts, 1937, with subsequent clarifying amendments is found in 7.951 to 7.964, pages 200 to 227, C. S. 1943. It provides for the creation of a board to be known as State Land Office Board which shall have control of all land south of a specified line crossing the state, "title to which shall be vested in the state of Michigan by virtue of any tax sale after the effective date of this act, whether occupied or unoccupied." (Sec. 3, p. 203, C. S.)

The direction as to auction sale of this land, known as "scavenger sale" contains the following pertinent provisions (Sec. 7):

> "Under rules and regulations of the board, the several parcels of land appearing upon such lists, shall be offered for sale separately, at the respective county seats, at the office of the county treasurer, or at such other convenient place as may be selected by the State Land Office Board, to the highest bidder at said sale beginning on the 2nd Tuesday of February of each year: * * * Provided that no bid shall be accepted for a smaller sum than 25% of the assessed valuation of the parcel of land as fixed and determined at the last assessment for the year preceding the vesting of title in the State of Michigan as shown in the records of the county treasurer, * * *" (page 210 C. S.) "Any owner shall have the right for a period of 30 days after the making of the highest bid, as in this section provided, to meet such highest bid, by paying the amount thereof to the representative of the Board conducting the sale in such county, or he may on application to said land office board enter into an agreement with such board for the payment of the sum required to meet such highest bid, in installments to be paid over a period of not to exceed 10 years, with interest on unpaid installments computed at the rate of six percent per annum from the date of said agreement * * * which agreement

shall provide that said vendee shall forfeit his right thereunder by failure to meet such payment or failure to meet all current taxes and assessments during the life of such agreement before such taxes and assessments become delinquent, and receive, when installments are fully paid, a quit claim deed executed as hereinafter provided." Page 212 C. S.

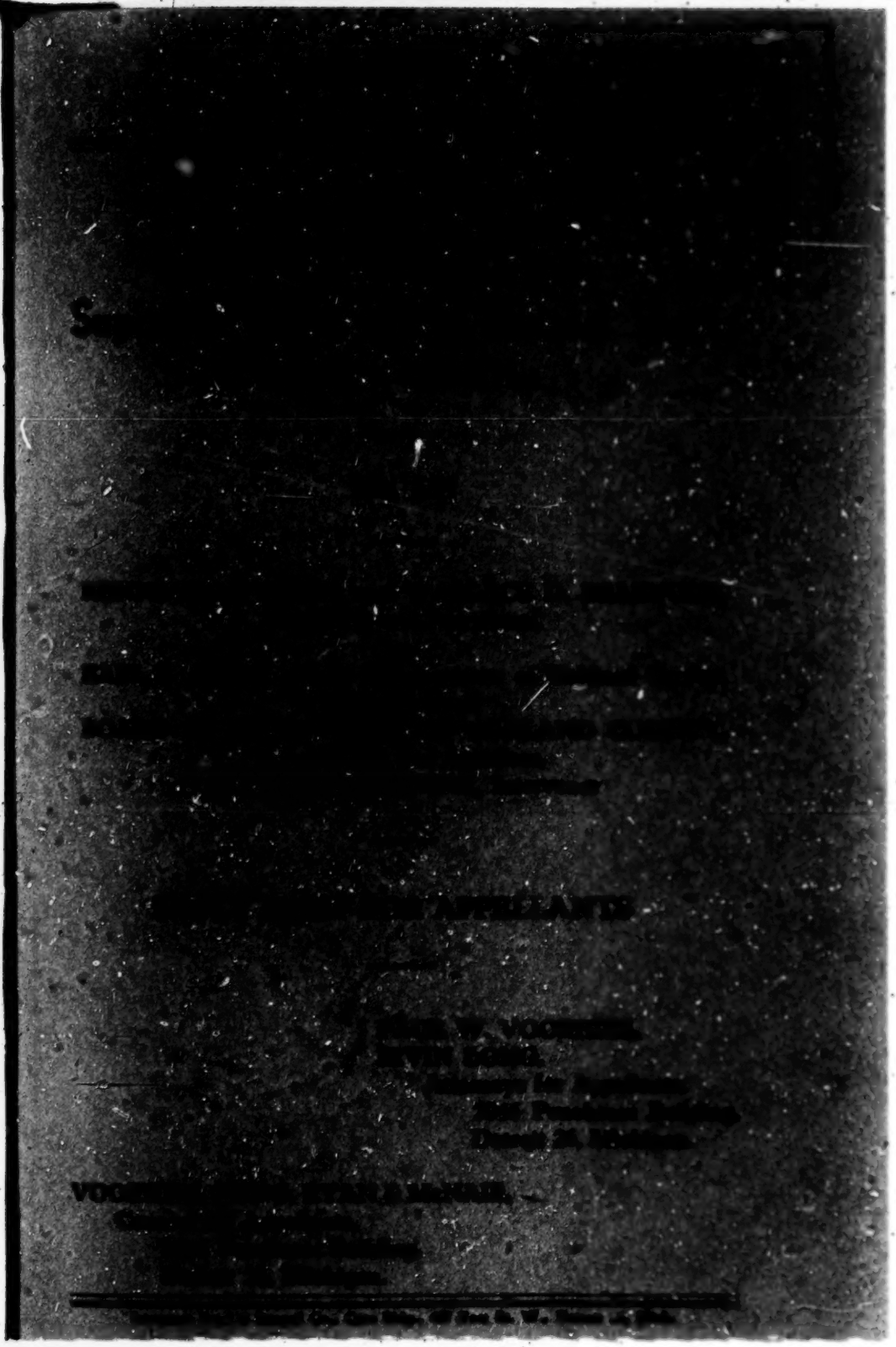
The effect of the quit claim deed is stated in Sec. 9 as follows:

> "The board is authorized, for and on behalf of the State of Michigan to execute, with the seal of the Board attached, such quit claim deeds, land contracts, leases or other contracts, documents or papers as may be necessary to carry out the provisions of this act. Any quit claim deed or deeds executed by the board or department shall convey title in fee to land under the provisions of this Act free from any encumbrances, including all taxes and special assessments which were cancelled by the decree pursuant to which the state obtained title, except as herein otherwise provided. It shall be the duty of the Board to notify the county treasurer of the county wherein the same are located of any conveyances or contracts which would enable such land to be returned to the tax rolls for assessment of the interest conveyed thereby and the county treasurer shall immediately report the same to the proper assessing officers • • •" (p. 225 C. S.)

Disposition of receipts obtained by the State Land Office Board is treated in Sec. 10, as follows:

> "All moneys received by the State Land Office Board • • • shall be credited to the general fund of the state, and after first deducting such commissions and maintenance costs as are authorized in Sections 4 and 8 of this Act, shall be paid to the several county treasurers who shall remit the same to the several tax assessing units • • • in propor-

tion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this Act, by the board, any county treasurer or the department of conservation * * *. It shall be the duty of any county treasurers to prepare a certificate of all cancelled taxes upon any such description of land upon request by the state land office board. The department of conservation, or the auditor general, which certificate shall be on a form approved by the auditor general and shall be the basis for distributing of moneys between the several taxing units. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments assessed or levied against said land prior to the vesting of title in the State of Michigan." (p. 226 C. S.)



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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

REPLY BRIEF FOR APPELLANTS

We shall in this brief cover some of the fundamental errors which seem manifest from a perusal of the briefs filed by appellees and the State Attorney General. The topics under which the argument will be divided are as follows:

1. Misconception of issues disclosed in opposing briefs.
   (a) Only right to a deficiency assessment involved.

(b) Portions of Acts 114 and 155 not affecting deficiency assessment will not be affected by reversal.

2. Answer to various arguments on question of jurisdiction.

3. Answer to various arguments for affirmance.

(a) No advance consent to withdrawal of taxing power given.

(b) Bonds are general obligations of district.

(c) Injury to bondholders in giving scavenger sale lands an exempt status.

(d) Police power not involved.

I.

MISCONCEPTION OF ISSUES DISCLOSED IN OPPOSING BRIEFS

(a) Only Right to Deficiency Assessment Involved

The opposing briefs barely mention the real point in issue, and devote most of their space to arguing the right of a state to pass legislation accelerating the date when title to delinquent tax lands vests in the state, and providing machinery for disposing of such lands after title is so acquired. No doubt that was as far as the legislature intended to go. No indication is given in the title to either Act 114 or 155 of an intent to create exemptions from any taxes to be levied in the future, and the peculiar interpretation given to the term "encumbrances" could hardly be anticipated. Had the statutes not contained the declaration that encumbrances are cancelled, and if the court had not interpreted the word "encumbrance" to apply to a deficiency assessment which might

in the future be required, there would be no controversy between these parties. The drain commissioner would have had no doubt of his duty and power to levy such an assessment against all the lands in the district not exempt by reason of the express exemption statutes. (See p. 30 of our first brief.) The refunding plan embodied in the commissioner's order (R. 11) would have been put into effect.

There was no petition by appellants for the levy of portions of the original assessment against scavenger sale lands. Neither the trial court nor the Supreme Court considered this question, and no error has been assigned here, (R. 51) because the lien of the original assessment was destroyed. Whether the legislature could constitutionally destroy such prior lien is a question on which no court has been asked to express an opinion.

Let it therefore be understood once for all that the question is the constitutionality of statutes, which have the effect of taking from bondholders the resource for the payment of their bonds, involved in the right to a deficiency assessment against all privately owned lands in the district.

(b) Portions of Acts 114 and 155 Not Affecting Deficiency Assessment Will Not Be Affected by Reversal.

The Attorney General's brief seems to be concerned with the fear that this court may declare Acts 114 and 155, with their amendments, void in toto. We ask no such decision, for if given it would go far beyond the necessities of the case. The provision inadvertently contained in these statutes, which has the effect of destroying the right to a deficiency assessment, is entirely separable, as is at once apparent by reading the word "en-

cumbrance" in its normal meaning of a burden upon land created or permitted by the owner, and excluding therefrom the meaning of such burdens as future taxation, which most persons would regard as a necessary concomitant of owning land in an organized community. Had the Supreme Court of the state placed that interpretation on the word, the statutes would have had all the beneficial effects intended so far as the state at large is concerned. They would have accelerated the date of acquisition of title by the state, and provided machinery for liquidating the titles so obtained.

It is difficult to understand how counsel for appellees can misunderstand the issue in this case when he so clearly stated in his brief in the Baker case the reason why bondholders were not injured by a liquidation of the lien of a special assessment at less than face value, inasmuch as the deficiency assessment would provide them with the means to obtain payment of their bonds. (See quotation, p. 15 of our first brief.)

II.

ANSWER TO VARIOUS ARGUMENTS ON QUESTION OF JURISDICTION

Appellees say, p. 30 of their brief, that appellants did not ask the trial court to pass upon the validity of Act 114. The record, however, shows (R. 3-5) that petitioners stated in their petition that they are entitled to a deficiency assessment as provided in the drain law, but that respondents claimed that they could not impose it because so many parcels had, in their opinion, become exempt. Petitioners further alleged that nothing contained in Act 155, Michigan Public Acts 1937, or any statute "*in pari materia*," could abrogate or curtail their right without violating Article I, Section 10, of the con-

stitution. Certainly no one could consider that Act 114 was not embraced in the term "*in pari materia.*" Appellees consistently argue that both statutes are part of the same legislative scheme.

The trial court said he was obliged to hold that the Municipal Investors Association case required him to decide that all privately owned lands which had passed through the scavenger sale were exempt (R. 31). This requires some consideration of that case. The opinion of Sharpe, C. J., signed by four other judges, thus constituting a majority since the court contains eight members, and two of the justices took no part in the decision, quotes from both Act 114 and Act 155 those portions which refer to the cancellation of encumbrances, and then proceeds to hold that the liability to a deficiency assessment is an encumbrance. The opinion then concludes, "it would naturally follow that the possibility of reassessment would constitute an encumbrance and thus be cancelled."

Appellants in the present case claimed error in their reasons and grounds for appeal (R. 1) because the trial court held that privately owned lands are exempt, thus challenging all the reasons given by the Circuit Judge for so holding. The Supreme Court noted appellees' argument that any subsequent legislation destroying the right to a deficiency assessment violated Article I, Section 10, saying that the "impairment argument was presented in both the Baker and Birmingham cases and denied in each decision" (R. 44). It quoted from Acts 114 and 155, and after referring to the interpretation of the word "encumbrance" it said that in connection with the impairment argument it was necessary to consider the causes leading to the legislation under attack. It thus recognized that the statutes forming the basis

for the Birmingham decision, and which it again quoted, were under attack.

It must be presumed that the Michigan Supreme Court read the petition in the record before it and saw that Act 155 and all acts *in pari materia* were alleged to constitute no bar to petitioners' claim, because of Article I, Section 10, of the Constitution. It took no narrow ground in deciding the case, such as would be involved, had it said to appellants, "You only mention Act 155 in your statement of questions in your brief, therefore we will say that Act 155 does not impair contract obligations and will not pass on the question in respect to Act 114." It treated all the legislation claimed to create the exemption as under attack, and proceeded to answer the attack.

Judicial Code 237a, which gives this court jurisdiction in appeals from the State Supreme Courts, does not specify that federal questions to be reviewed must have been presented to the state court in full compliance with the rules of that court. If the question is ignored by the lower court and the record fails to show proper presentation, this court properly refuses to pass on it, but a different rule governs an appeal where the lower court actually treated the question as before it, and decides it. There can then be no inquiry as to whether the lower court should have considered it, so long as it is material to the ultimate decision. The rule stated in *Bryant v. Zimmerman*, 278 U. S. 63, quoted on p. 10 of our brief opposing the motion to dismiss, is applicable. This necessarily must be so, for the question as to whether litigants conform to state procedural rules is a local question, which this court does not review. The lower court can waive its rules as to what questions it will pass upon, and if it does so, such waiver is not open to attack by an appellee.

Counsel for appellees, in their brief in support of the motion (p. 7), and the Attorney General rely upon *Honeyman v. Hanman*, 300 U. S. 14, and *Southwestern Bell Telephone Co. v. State of Oklahoma*. The correct citation of this is 303 U. S. 206. Appellees quote from the syllabus of the former case, which, of course, must be read in connection with the opinion. In that case the record and opinion did not disclose the raising or decision of a federal question, but a certificate was afterwards obtained to the effect that it was raised and decided. This court was not satisfied with the conclusions set forth in the certificate, and remanded the case for a further explanation. This apparently was given, for the case was again before this court in 302 U. S. 375, where the federal question was considered and the appeal dismissed for the want of a substantial federal question, the court indicating a long line of decisions where the precise question had been decided adverse to appellant. In the Southwestern Bell Telephone Company case the court said, "It must appear affirmatively from the record, not only that a federal question was presented for decision * * * but that its decision was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it." Cases cited in support of this, particularly *Whitney v. California*, 274 U. S. 357, show that whether the federal question appears to have been raised in pleadings, requested instructions, motions or assignments of error, it is enough if the opinion of the lower court shows the raising of the question, decision adverse to appellant, and materially to the ultimate conclusion reached. In that case this court noted that neither the record nor opinion showed that a federal question was presented or decided. But after writ of error had been issued by this court, and

had been returned, the state court entered an order to the effect that it had expressly considered and passed upon the question of whether the statute in question was repugnant to the 14th amendment. The court said:

> "So—while the unusual course taken to show that federal questions were raised and decided below is not to be commended—we will give effect to the order of the court of appeal, as would be done if the statement had been made in the opinion of that court when delivered."

This, in our opinion, conclusively shows that when the lower court expressly considers the federal question, inquiry is foreclosed as to how it came to consider it.

Other decisions as follows confirm us in the view that the broad statement in the Zimmerman case applies here, and is still the rule of this court:

Chicago R. I. etc. Ry. Co. v. Perry, 259 U. S. 548.

> "Defendant in error moves to dismiss the writ of error on the ground that the constitutionality of the act was not really at issue * * *. But since the court of last resort of the state actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the constitution of the United States, and decided in favor of its validity, it is clear that under the first section of 237 Judicial Code, as amended by the Act of September 6, 1916, we have jurisdiction to pass upon the question."

Home Insurance Co. v. Dick, 281 U. S. 397.

> "That the federal questions were not raised in the trial court is immaterial. For the Court of Appeals and the Supreme Court of the State considered the questions as properly raised in the appellate

proceedings, and passed on them adversely to the federal claim."

Whitfield v. State of Ohio, 297 U. S. 431.

> "The record fails to show that the points made by petitioner in this court were properly raised in the trial court. But it sufficiently appears from the opinion of the appellate court that the court considered and passed upon the following questions * * *. These questions, therefore, are properly here for consideration."

Nickey v. State of Mississippi, 292 U. S. 393.

> "So far as the state court discussed these questions * * * with specific reference to the Constitution of the United States, both in its original opinion and in an opinion denying appellants' application for a rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignments of error to the State Supreme Court, as required by its rules."

Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U. S. 23.

> "The specific contention that the plan of assessment violated the equal protection clause of the 14th amendment was presented by petition for reargument and was considered and was explicitly overruled by the Supreme Court. As the state court entertained and decided the federal question, this court has jurisdiction."

Arguments based upon the contents of appellants' briefs in the state court are irrelevant, for briefs are no part of the record. If briefs fully present the federal question, but the record does not, and the lower court ignores it, such presentation will not save the question for review in this court. *Zadig v. Baldwin,* 166 U. S. 485.

Conversely, it must be true that failure to properly present such question in the briefs cannot deprive appellants of the right to a review where the lower court fully considered it. The oral argument may have been adequate, and from it the lower court may have been brought to a consideration of the question.

On page 11 of appellees' brief on the motion, they admit that Act 114 is referred to in connection with the federal question in the reply brief of appellants in the state court, saying: "True, the reply briefs attempts to gather Act 114 of 1937 into the fold, but still the 'Statement of Questions Involved' presented to the Michigan Supreme Court did not pass on it other than to say, 'The impairment argument was presented in both the Baker and the Birmingham cases was denied in each decision.'" Probably something was omitted in printing this in appellees' brief, and what counsel intended to say was that the statement of questions did not mention Act 114, and that the Supreme Court did not pass upon it. We think the latter is unfounded for as we have pointed out above, there was in the opinion a complete reference to both Act 114 and Act 155, with quotations therefrom, before the court took up its reasons for holding the impairment argument inapplicable.

It is always unfair to pick out certain portions of a document, whether it is a pleading, opinion or brief, and to build an argument upon it. The portions of our reply brief in the state court where both acts are gathered into the fold, as appellees concede, are the following, which we quote:

> "To put our argument in its briefest form, we submit that the Commissioner is now obliged to levy a deficiency assessment upon the municipalities and every parcel of land in the district which is subject

> to ordinary taxes, and that he misconstrues the meaning of Acts 114 and 155 of 1937, as amended, in holding that any land subject to ordinary taxes has been made exempt from a deficiency assessment."
>
> • • • • •
>
> "But if the strange interpretation given to Acts 114 and 155 of 1937 is accepted, then surely we have statutes which in this instance violate the contract clauses of both state and federal constitutions. For if those statutes mean, as appellees insist, that taxing districts have had removed from them the bulk of their taxable property so that there can be no further imposition of taxes to provide funds for the retirement of their debts, then bondholders have had their contract rights impaired."

The Supreme Court of the state thus had before it ample printed argument, in addition to the oral argument, to justify it in considering that both acts, as parts of a general legislative scheme, were attacked by appellants as violative of the impairment clause, and could not be urged as a defense to appellants' claim that a full deficiency assessment should be levied.

III.

ANSWER TO VARIOUS ARGUMENTS FOR AFFIRMANCE

Apparently appellees agree with the general proposition that laws providing for the levy of taxes for payment of municipal bonds enter into and form a part of the bond contract, and except for inconsequential procedural changes, subsist until the contract is discharged, and that any change therein which takes from the bondholder resources for payment violate Article I, Section 10, of the Constitution; and further, that it is not a question of the degree of impairment. The least is as much

prohibited as the greatest. We agree that the portions of Section 5, 15 and 18 of the Drain Law quoted on pages 2, 3 and 4 of appellees' brief, constitute parts of the contract of the bondholders in this case.

(a) No Advance Consent to Withdrawal of Taxing Power Given.

Appellees say (p. 12 of their brief) that appellants had specifically contracted to have their lands (meaning, of course, land in the drain district) sold in compliance with the general tax law. If by this appellees mean that they agreed in advance to having general tax laws changed so as to provide the tax exemptions now decided to exist, the answer is "No." Section 5 provides that "drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner, as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes." This looks to collection, and not to release of taxes. It merely provides that the drain taxes, when levied, shall go on the tax statements and be collected as the general state, county, township, etc., taxes are collected, and by the same officers, and under the same penalties and interest as apply to such taxes. It grants no consent to the passage of subsequent laws, withdrawing any part of the taxing power necessary to pay the bonds.

(b) Bonds Are General Obligations of District

Appellees contend that the bonds here involved are not general obligation bonds (their brief p. 35), which we

think is erroneous. They deny that the full faith and credit of the district is pledged (their brief p. 32).

While bonds shall specify on their face that they are payable out of installments of drain taxes to be thereafter collected, that is not the only resource for their payment, for if such taxes are not collected there must be an additional levy. The bonds are signed in behalf of the drainage district by the Commissioner. He is required to "pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby." Counsel say, on p. 19 of their brief, that the district was never liable for more than 77½% of the indebtedness, ignoring the fact that the phrase "in the proportion that they are taxed for the benefits received thereby" applies to the lands and political units taxed at large. The district is the obligor on the bonds and does not tax itself. It promises to pay the bonds in full, not merely such amount as can be collected from the taxes levied. Otherwise the bonds would not be negotiable, for a bond without an unconditional promise to pay lacks the essential of negotiability. These bonds carry the direct and unconditional promise of the district to pay, even though the first resource to be looked to is the assessments (R. 7 and 8). In *Royal Oak Drain District v. Keefe,* 87 Fed. (2) 786, the court said in answer to a contention that Michigan drain bonds are not negotiable "that negotiability is not destroyed if all revenues of a district are pledged by a recited condition that funds must come from a single source. *Duval Cattle Co. v. Hemphill,* 41 F. (2) 433." These bonds differ materially from those involved in Municipal Investors Association case. The record in

that case (p. 9) shows that there the village only pledged payment from the special assessment fund when collected.

Drain bonds are not issued by a municipality to be paid merely from taxes which may be collected from a certain part of the territory within the municipality. The drain district is the municipality itself, and subject to suit in its own name upon the obligations. *Bloomfield Village Drain District v. Keefe,* 119 F. (2) 157. They are the type of obligation which this court referred to in its note to *Municipal Investors Assn. v. Birmingham,* 316 U. S. 153, at p. 159, as exemplified in *American Falls Reservoir Dist. v. Thrall,* 39 Idaho 105, *Noble v. Yancey,* 116 Oregon 356, etc. To this list we add *Hallenbeck v. Yuma County,*.....Ariz....., 145 Pac. (2) 837, decided February 11, 1944, wherein the court considered the question as to whether realty in a power district which had passed through a tax sale, and had been returned to private ownership, was subject to additional taxes. It held as follows:

> "Considering all of the provisions of the Power District Act, as well as the other pertinent statutes of Arizona, we hold: (1) that Power Districts were organized for public purposes and are quasi municipal corporations; (2) that they are given certain sovereign taxing powers, and that the intent of the legislature was to make their district indebtedness general obligations for the payment of which the whole district is obligated; (3) that the sale of real property in such a district for unpaid taxes discharges all tax liens and assessments theretofore levied against the property sold; (4) that the property involved in this litigation was not subject to district assessments after its sale to the State of Arizona, nor was it subject thereto after the issuance of the tax deed to the State and before the

sale to plaintiffs; (5) that when the property again passed back into private ownership by sale to plaintiffs it at once became subject to taxation for district purposes: The land remains within the district and is therefore subject to taxes subsequently lawfully levied and assessed for any district purpose, such as: Maintenance and operation, bonded indebtedness, and past delinquencies, whether of principal or interest. Since all lands of the district are entitled to equal benefits, it would be arbitrary and unjust to make any distinction between lands theretofore sold for taxes once they went back on to the tax roll, and of other lands in the district that had not passed through this tax sale process."

We fail to see how the Michigan Drain Law can be construed in any light other than that drain bonds are full general obligations of the district which issues them.

1. They are issued in behalf of the district by the commissioner, and he pledges therein the credit of the district. Act 316, Michigan Public Acts 1923; Chapter X, Section 18; Section 4937, Michigan Compiled Laws 1929.

2. With respect to all bonds issued after the effective date of Act 331, Michigan Public Acts 1927 (and this applies to these bonds), the county was required to advance moneys from the general fund for their payment, to be reimbursed from drain taxes subsequently collected, except in case such advancement caused the debt of the county to exceed its constitutional limit. Section 4937, Michigan Compiled Laws 1929.

3. "Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same, and to pay all costs and incidental expenses or to pay the principal and interest on bonds if such are issued, further assessment shall be made to meet the deficit or

additional expense. Such further assessment shall be apportioned, assessed, levied and collected as provided in the first (1st) instance and on the same percentage, and shall be collected in one (1) year, but there shall be no review nor appeal from such further assessment." Act 316, Michigan Public Acts 1923; Chapter IX, Section 3, Section 4917 Michigan Compiled Laws 1929.

4. Direction to the commissioner as to the levying of annual installments contained in Act 316, Michigan Public Acts 1923, Chapter X, Section 2, Section 4924 Michigan Compiled Laws 1929, are as follows:

> "The commissioner shall prepare a tax assessment roll in each year for the collection of taxes for the current year, and shall certify the same to the county clerk on or before the first (1st) day of the annual meeting of the board of supervisors. In each such roll he shall add to the amount to be collected, interest on all unpaid installments to the date of tax collection. To the roll for the last year he shall add such further amount, if any, as may be necessary, together with outstanding uncollected taxes, to pay all outstanding bonds and interest thereon to maturity."

5. After the bonds have all fallen due and there is insufficient in the fund to pay them, he shall make the deficiency assessment invoked in this case. Section 4940, Michigan Compiled Laws 1929.

6. Following certain criteria set forth in *Judith Basin Irrigation District v. Malott*, 73 F. (2) 142, for determining that improvement district bonds are general obligations, we add the following: (a) The amount of the bond does not represent a lien upon any particular piece of property. (b) The bonds on their face purport to be obligations of the district, and not of any specific piece of property or of any owner of any individual piece of

property. (c) The purchaser of a bond cannot enforce it against any particular piece of property, nor can the owner of any particular piece of property pay the bond and thus discharge his land from the lien. (d) The purchaser of the bond must rely upon the collection of such assessments as the law authorized to be levied, plus to a limited extent, the general fund of the county. (e) The payment of the bonds of earliest maturity does not release any parcel of land.

The Michigan courts have not directly passed upon whether such bonds as these are general obligations of the district, but its decision below in holding that municipalities and non-scavenger sale lands are subject to a tax for a part of the deficiency is consistent with that view. As this court said in the Municipal Investors case, "Assessment bonds may be based on undertakings whereby benefited lands may be liable even after they were sold to pay the assessment liens upon them to recover for defaults in sales of other assessed properties. See *Kadow v. Paul,* 274 U. S. 175." Subsequent to the Kadow case this court decided *Roberts v. Richland Irrigation Dist.,* 289 U. S. 71, wherein it said:

> "The principle applied in *Norwood v. Baker,* 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443, and similar cases, has no application here. Appellant's land will be assessed to meet a general obligation of the corporation and the mere fact that the apportioned burden will exceed estimated benefits gives no color to the claim of confiscation. As pointed out in the cases cited lands may be taxed to pay for local improvements although they receive no actual benefits. Never, as the Supreme Court of the state has said, was appellant entitled to the segregation of his share of the corporate obligation. The statute did not contemplate that assessments against any tract should be limited to payment of its increased

value. A general obligation was created and every tract subject thereto."

The confusion betrayed by appellees' brief results from supposing that a municipality which gets its revenue from taxes assessed on the benefit basis, rather than from unlimited *ad valorem taxes,* changing in rate and amount from year to year, must necessarily be held to have issued something other than a general obligation bond. This is untrue, for the character of the bond must be determined by the nature of the obligation expressed therein (as authorized by the law), rather than by the nature of the revenue from which it is to be paid.

Necessarily property in a municipality which has issued general obligation bonds becomes a virtual surety for other property. Extinguishment or destruction of other property as tax resources results in the load of municipal debt resting entirely upon what remains. Although rarely, it sometimes happens that this load threatens confiscation of the remaining property and the municipality is to all intents and purposes insolvent. The possible removal of a factory upon which the inhabitants depend for employment, and the loss to the community of the taxes which the factory property must pay, is always a hazard considered in purchasing general obligation bonds of a one industry town.

There is, therefore, ample ground for holding these bonds general obligations of the drain district, intended to be met at all times by the tax resources of the district. Appellees say (p. 31 of their brief) it is ridiculous to suppose that after the state held the lands for one hundred years, the fourth and fifth generations of bondholders might "pop up some day and greet the stranger in possession and say, 'you owe me some money on the

East Clawson Storm Sewer Drain.'" The question is extreme because bondholders would hardly spend the money for that length of time taking judgments upon the bonds to prevent the running of the statute of limitations, but it is conceivable that they might for twenty or thirty years so as to be ready to liquidate them when the community developed to a point where the land would be in demand. There are many instances where bonds of some communities have been kept alive, and liquidated as a result of the growth and return of prosperity of the municipality once considered hopelessly bankrupt.

(c) Injury to Bondholders in Giving Scavenger Sale Lands a Tax Exempt Status.

Again and again we find appellees asserting statements as follows: "Appellants have been deprived of nothing, hence their claim of impairment is without foundation," p. 2 of their brief. "If Acts 114 and 155 had never been passed appellants could and probably would have been in the same position they occupy today," p. 24 of their brief.

The loss to bondholders appears, according to their computation (p. 36 of their brief), to be more than 50% of the deficiency.

Certainly many conditions can happen which will cause loss to an investor in a municipal bond, even though there has been no interference by the legislature in changing tax resources. No one can know with certainty, however, when a change in law depriving bondholders of tax resource is made, what their exact position would be if there had been no such change, and we insist that it is not incumbent upon bondholders to prove the extent of their loss, nor is it the province of a court to indulge in conjecture.

When the question arose in this court as to the power of states to pass bankruptcy laws involving a release of a debtor from his obligations, there must have been an argument to the effect that creditors should not complain because they could not prove that the debtor whose property had been surrendered in the proceeding would again have property sufficient to pay the creditors, but the court, in *Sturges v. Crowninshield*, 4 Wheat 197, 198, said:

> "But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts, and to release them from this liability impairs their obligation."

In *Bank of Minden v. Clement*, 256 U. S. 126, the court reversed a state court which upheld a statute exempting proceeds of insurance from liability for debts created prior to the passage of the law. It was not impressed by the fact that the state court had said that the law "impaired the obligation of pre-existing contracts very slightly and remotely."

Because a creditor cannot say with certainty that the debtor will again rehabilitate himself and be in a position where he can be forced to pay is no justification for taking from the creditor the right to look to such future property as the debtor may be industrious enough, or lucky enough, to acquire. While municipal corporations do not have the prospect of acquiring future property, the possibility of changes in economic conditions whereby their tax resources can become valuable is the same type of potential resource for debt payment as the court mentioned in *Sturges v. Crowninshield* (supra).

Can the court say that bondholders are in no worse position because the statutes of 1937, as interpreted by the state court, take away this right to a deficiency assessment? We recognize that there are situations where some subsequent change of law in regard to tax collections or enforcement do not interfere with rights flowing from the bondholders' contract. A change in the officers who are obliged to levy or collect the assessments, a change in times of levy and collection dictated by administrative requirements, and not by a purpose to evade the debt, fall within this category. But this change is not of that character. There was a clear and definite right to the deficiency assessment, a right previously recognized by the court, of vital importnce in providing funds for the payment of a drain debt, for in *Regents v. Pray,* 264 Mich. 693, 700, the court considering a defense by a county to a claim that it should advance money to pay drain bonds from its general fund in accordance with the law then existing, said that the county would be reimbursed for such advancement by the levy of a deficiency assessment. Said the court:

> "Regardless of the temporary advancement by the County, in the end payment is by the drainage district. If the first assessments are inadequate, there is express statutory provision for an additional assessment upon the drainage district. 1 Comp. Laws 1929, Art. 4940."

A municipal corporation, or other public body empowered to incur a general obligation, cannot discharge the debt or any part of it by merely requiring the creditor to accept certain of its assets in fulfillment thereof, unless such is the contract with the creditor. This is well illustrated in *Pryor v. Goza,* 172 Miss. 46, 159 So. 99. The statute there under consideration provided for proceedings to value the assets of a drainage district, i.e.

the assessments which could be collected, and if determined to be less than the bonded indebtedness to issue liquidation certifies in amounts determined to be equal to the assets, which when discharged would free the lands from further taxes, except for maintenance and administration. The court held the statute invalid because of impairment of the obligations of contract, saying:

> "It is difficult to conceive of the insolvency of a taxing district; the lands constituting the district are there,—they cannot be lost except by title in the state. Furthermore, the assessed benefits of the district may be wholly insufficient to pay its obligations during the years of an economic depression, and amply sufficient for many years after recovery from such depression * * *.
>
> "Where a statute makes a contract more beneficial to a party and less to the other than its terms provide, its obligation is impaired; releasing only a part of the obligation impairs the contract. A law which enlarges, abridges, or in any substantial way changes the intention of the parties as expressed in the contract impairs the obligation. A law dispensing with any substantial force of the contract, imposing conditions not expressed, or dispensing with those expressed, is a violation of its obligation."

The court, in speaking of insolvency, was, of course, not considering it in the sense of present inability to meet debts, but in the sense of total inability, present and future. The municipality is not merely an aggregation of individuals to be looked to for contributions to pay the debt. It has a fixed body of property, which cannot be moved away, which can always be taxed so long as it is not in the hands of the federal government, the state, or any of its municipalities, and used for governmental purposes. Creditors have a right to

rely upon the power to tax this property, when it is provided in the contract that such taxes shall be levied. They take the chance, it is true, that temporarily the property may be in the hands of the state through the operation of tax enforcement proceedings, but the chance that it will be sold by the state and returned to taxable status is a resource of some value, which cannot be taken away from them by state legislation. It is possible that this year it may seem of little or no value, but next year it can be of great value, dependent upon circumstances which no one can predict.

No evidence can be found in this record which justifies anyone in saying that the small pittances which will be paid to these bondholders out of the proceeds of scavenger sales is all that they could hope to receive, if they have the right to a deficiency assessment as provided in the law. It is a mere conjecture to say that the man who bought a parcel of land at scavenger sale for 25% of assessed valuation did so with the expectation that the land would be exempt from any levy for future drain taxes to pay the district debt, and that if he had not expected such exemption he would not have bought it. The purchasers at the sale may be credited with having enough knowledge of law, or to have been so advised by competent counsel, that a future assessment for deficiency would be levied. If they had inquired of Mr. Merritt, Corporation Counsel, he would have so stated, before the Municipal Investors Association case was decided, for he so argued in his brief to the Michigan Supreme Court in the Baker case (see p. 15 of our first brief). After all, the purchase of land at 25% of assessed valuation is quite a bargain, and still leaves a considerable margin for profit even in the face of future deficiency assessments. Inquiring purchasers would know

that negotiations for the refund of these bonds were under way, that the commissioner, in anticipation of such refunding, had spread the remaining six installments of the original roll over a period of 25 years (R. 12, 41), and that by refunding, the annual installment would be greatly reduced. Certainly such purchasers would be expected to take into consideration the indebtedness of other government units which could tax the land, and contemplate the future tax burdens necessary to meet such indebtedness.

Much is made of the fact that 65% of this land went to scavenger sale, and from this it is inferred that the district had no future. The fact that owners of 11% of the lands considered the location sufficiently attractive to pay their original assessments in full (Ex. 2, R. p. 56), though not required to do so, and that the owners of 24% are paying assessments as required, are overlooked.

When we know more about the history of this district and the various factors which caused tax delinquency, it is surprising that the percentage of scavenger sale land did not exceed 65%. It is not alone the depression to which the delinquency can be attributed. There is nothing which so discourages tax collections as the prospect that they will not be enforced. The man who pays a tax only out of a sense of moral obligation is a rare exception. The certainty that it must be paid or the property lost is far more compelling.

Until 1931 there must have been a fairly good record of tax collections for this drain district, for it met all interest payments and retired $70,000.00 of the bonds. Subsequent to 1930 a condition arose which encouraged the hope on the part of many land owners in drain districts that assessments against them would be held invalid for reasons set forth in *Clinton v. Spencer*, 250

Mich. 135, *Kinner v. Spencer*, 257 Mich. 142, *Twp. of Lake v. Millar*, 257 Mich, 135, and other cases reviewed in *Royal Oak Drain District v. Keefe* (supra). In these cases a distinction was made between a drain and a sewer, and assessments set aside where the improvement was held to be of such a nature that the removal of sewage was deemed to be the primary purpose of the improvement. Even today it is impossible for anyone to state what constitutes the criteria determining that such an improvement, as this particular storm sewer drain, falls within the category of a legal drain or not. Litigation was commenced by Village of Clawson in 1931 or 1932 to cancel assessments for this improvement, and the Circuit Court of Oakland County held that the improvement was illegal and that assessments were void, restraining perpetually the levy of any assessments against the village. Naturally property owners knew of this litigation and its outcome in the Circuit Court. It was not until July, 1934, that this decision was reversed. *Village of Clawson v. Van Wagoner*, 268 Mich. 148. This litigation was the real occasion for not levying installments after 1931. Even after the decision in July, 1934, and the court had held assessments valid, the commissioner delayed until 1937 before any move was made to resume the levy of installments. During this entire period taxpayers were encouraged to believe that they were to be relieved, partially at least, from the burden of real estate taxes of every nature. Tax sales were discontinued, ten year payment plans adopted, and planning commissions were working on tax relief legislation. When the assessments were resumed in 1937, Acts 114 and 155 of that year had been passed. The owners of land on which taxes were delinquent in an amount exceeding 25% of assessed valuation, which could easily occur, because by that time assessed valua-

tions had been greatly reduced, then had a potent incentive to let their property go to the scavenger sale. They knew they could at such sale bid 25% of assessed valuation, pay cash if they so desired, or buy from the state on a land contract under which they could have ten years to pay the amount bid, in installments at 6%. There was little danger in losing the land, for they could match the bid of any outsider within thirty days after such bid had been made, and they had the advantage over the outsider in that the latter must pay cash (see Section 7, Act 155, Michigan Public Acts 1937). Under these circumstances the fact that 65% of this land went to a scavenger sale is not surprising.

Facts known about this area destroy the pessimism apparent in appellees' contention that the condition was so hopeless that all that could be expected from these scavenger sale lands was the price obtained on the sale by the state, and that destruction of the right to a deficiency assessment is a boon to bondholders in that it enabled them to get a small proportion of the proceeds of this sale.

This drain district for the most part is in the northern part of Royal Oak Township, in Oakland County; a small part lies in Troy Township. The following figures are taken from the Census Reports, Michigan Manual, and Moody's Manual of Investments, the publication constituting the standard statistical compendium for municipal investors:

> Oakland County, second in the state in regard to population and assessed valuation:
>
> Population 1930—211,251
> 1940—254,068
> Assessed valuation 1942—$252,725,909;
> 1941—$236,328,355.

The district lies partly in the City of Clawson and partly in the City of Royal Oak, which has extended its boundaries since the district was established. A small part of it lies in unincorporated areas in the two townships. It is about five or six miles from the northern boundary of the City of Detroit. Clawson is part of a contiguous group of surban cities, of which population and assessed valuation figures are as follows:

	Population		
	1930	1940	*Assessed Valuation
Clawson	3,377	4,006	$ 1,942,850.00
Berkley	5,571	6,406	3,844,675.00
Huntington Woods...	835	1,705	3,540,045.00
Royal Oak	22,904	25,087	26,282,435.00
Pleasant Ridge	2,885	3,391	3,465,695.00
Ferndale	20,855	22,523	20,302,150.00
Oak Park	1,079	1,169	1,869,940.00
	57,506	65,287	$61,247,790.00

*These figures are given in Moody's Manual for either the year 1942 or 1943. Generally it is stated that assessed valuations are on the basis of 50% of actual values.

Troy Township has a population of 8,500 and assessed valuation of $4,165,005.00.

Royal Oak Township, exclusive of the above cities, has a population of 24,958 and assessed valuation of $4,278,-935.00.

Immediately to the east of Royal Oak Township is Warren Township, of Macomb County. Population 1930, 14,269; 1940, 22,126. Assessed valuation, $15,928,755.00.

Something of the importance of this area can be gleaned from the decision in *Oakland County Drain Commissioner v. Royal Oak,* 306 Mich. 124 (1943), in

which the court considered questions raised as to the validity of the organization of the Southeastern Oakland County Sewage Disposal District. Insofar as the issues here are concerned, this case is only important for the facts there disclosed. The disposal district, which includes the township of Royal Oak and a small portion of two adjoining townships, comprises 41 square miles and has a population of approximately 100,000. Sewage from this district was carried in ten county drains (including the East Clawson Storm Sewer Drain), which ultimately discharge into Clinton River. Pollution became so serious by 1941 that the State Stream Control Commission ordered the political subdivisions involved to have the sewage treated. Legislation was passed authorizing the creation of the district and building of intercepting sewers to take the flow of these drains to the City of Detroit Sewage Disposal Plant, and the making of a contract with the city for the treatment of this sewage. The cost of the project was financed by an issue of $905,000.00 revenue bonds and a federal grant of $662,000.00. The facts so disclosed indicate the density of population in this territory, and recognition by state and federal authorities of its development. It clearly negatives the idea that any portion of the territory was in the process of reverting to wilderness because of excessive tax burdens.

Naturally a community developing as rapidly as this has serious financing problems, and must for many years bear a heavy load of debt for schools, paving, water mains, drains and sewers. Bondholders, as well as property owners, understand that liquidation of this debt must necessarily be slow, hence the willingness evidenced by refunding negotiations and the plan disclosed in the commissioner's order. However, conditions are not so serious

that bondholders must lose any part of the principal invested in order to keep the communities alive.

Statements made on page 37 of appellees' brief suggest the possibility that they are arguing that a lack of injury to bondholders must be presumed from the following consideration: Assuming appellants are correct, it was the duty of the drain commissioner to have levied a deficiency assessment in 1938, when the bonds were all due. If this levy had then been made upon the 65% of the lands which later passed through the scavenger sale, the lien incident thereto would have been extinguished and thus bondholders would have lost the benefit of the deficiency assessment so far as it related to 65% of the land. That argument would be persuasive as a defense by the commissioner were he sued for damages because of failure to make the levy, but that is not in issue here. It may be fortunate for bondholders that he did not make the levy, and that subsequent economic changes result in a condition whereby such deficiency levy would now be more productive than if it had been made when it should have been made. They are entitled to such benefit.

It also seems to be supposed that if a levy had been made in 1938, and not collected, there could have been no further deficiency levies. It is true that the law only contemplates one deficiency levy to be collected in one year unless refunding bonds are issued, in which case it may be flexible in amount and levied periodically as needed to provide a sinking fund for the retirement of the refunding securities. However, the law requiring this single deficiency levy does not limit the amount to a sum which only equals the amount of the deficiency. It must be in an amount sufficient to pay the bonds and interest. If the commissioner knows that some property has become exempt and cannot be taxed, it is his duty

to levy the deficiency for the full amount on the taxable property and municipalities, so that the loss from the exempt property will be made up. Valuable property in a taxing district may be taken over by the state and federal governments, and thus be non taxable. The law does not contemplate that the loss occasioned by the removal thereof from the assessment rolls shall be borne by bondholders. It probably would be impossible for the commissioner to know exactly what a deficiency levy would produce, and he might levy it for a sum which he was justified in believing would produce the required amount, and still be mistaken. When it becomes certain that the levy will not produce the amount necessary to discharge the debt, further additional levies can be ordered.

Hammond v. Place, 116 Mich. 628
Burnet v. City of Grand Rapids, 264 Mich. 593
State v. Common Council, 15 Wis. 30.
Norris v. Montezuma Valley Irrigation District, 248 F. 369, 374

Where a general obligation of a municipality is incurred, which can only be paid through the exercise of the taxing power, the debt is not discharged through an ineffectual exercise of that power.

State ex rel. Frazer v. Holt County Court, 135 Mo. 533
In re Dancy Drainage District, 190 Wis. 327, 332, 336

(d) Police Power Not Involved

On page 28 of appellees' brief, the argument is made that this legislation is justified by the police power. We have freely conceded that legislation reforming tax sale procedure is a legitimate exercise of the police power, and that all that is here involved is the right of a state to remove tax resources pledged to the payment of bonds. If the legislature had passed a separate law limited to the one object of freeing scavenger sale lands from future deficiency assessments to meet the bonded debts of drain districts, there would have been little doubt as to its invalidity when applied to previous debts. Confusion arises because the portion of the legislation attacked is embraced in statutes having a legitimate object. The state legislature gains no right to legislate for an object beyond its control, by incorporating provisions having that effect in statutes otherwise proper.

In reference to the police power, the provision which we attack must be considered as if embodied in a separate act of the legislature containing forthright language purporting to confer the exemption under consideration.

> "The police power is not a universal solvent by which all constitutional guaranties and limitations can be loosened and set aside, regardless of their clear and plain meaning, nor is it a substitute for those guaranties.
>
> "With regard particularly to the Federal Constitution, it is elementary that a right secured or protected by that document cannot be overthrown or impaired by any state police authority, because the police power of a state must be exercised in subordination of the Federal Constitution. • • •
>
> "Not all police regulations which have the effect of impairing a contract are obnoxious to the consti-

tutional prohibition as to impairment. It must be remembered, however, that although the obligation of contracts must yield to a proper exercise of the police power, the latter must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

11 American Jur., pp. 993 and 1001
Treigle v. Acme Homestead Assn., 297 U. S. 189

Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, seems to be the main reliance of our adversaries and the lower court, but we think that as far as that decision goes it only sustains the police power to the extent of temporarily impairing the power to enforce contracts.

The statutory provisions, interpreted to create this exemption, do not indicate the exercise of the police power to an end which is, in fact, public. There was no public emergency requiring that a portion of drain district debts should go unpaid. The total of such debts is but a small portion of the total public debt of the state, or even the communities where this drain exists. No public disaster was threatened if some landowners were forced to lose their property because of inability to meet their portion of the debts of the districts. This statute does not provide merely for delay in enforcement,—that had already been given in good measure. It provides for absolute cancellation of a part of the obligation. In the interest of the public, if the police power argument is to be accepted, landowners are to be benefited at the expense of the district creditors. Hence the provision offends against the principle that the means for promoting public welfare must not be arbitrary and oppressive. If it becomes so essential to the welfare of the

state of Michigan that the lands of the individual owners who have acquired them at scavenger sale must be protected from further assessments for this drain debt, then the way to afford that protection is by public assumption of the obligation "so that through taxation the burden of relief afforded in the public interest may be born by the public."

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555.

We submit that appellees' brief fails to support the decision of the lower court.

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

AMPLIFICATION OF APPENDIX TO APPELLANTS' FIRST BRIEF

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AMPLIFICATION OF APPENDIX TO APPELLANTS' FIRST BRIEF

EXPLANATORY STATEMENT

We wish to avoid violating the court's rule against filing additional briefs after the argument, yet we wish to meet a condition which was apparent at the argument—confusion as to applicable statutes. Some statutes were

quoted in appellees' brief and our reply brief which were not in our appendix, and in some references to these there might be confusion as to where they are found. Sometimes a reference was made to a chapter and section of an original enactment, which might appear to be a reference to a statute not already quoted, because the original quotation might give the section number in a compilation. We therefore believe that an amplification of the original appendix will aid the court if we put in one place all statutory provisions quoted anywhere in the argument sections of the briefs, and add thereto some other sections which might have a bearing upon the issues, or might aid the court in understanding procedure preliminary to levying drainage assessments. Many of these may be quite remote from the issues, but they are included in order to explain other provisions having a more direct bearing.

Let us further explain the section numbering. Both the drain law and general tax law developed from codifications with numbered sections to which there may be cross references confusing in the compilations. We therefore place before each quotation the section number appearing in the original codification and in a note under the quotation we cite the compilation section number and other explanatory matter which may be helpful.

We wish to here answer a question occurring at the argument when something was said as to Act 316 Michigan Public Acts 1923. That act was the codification of the Michigan Drain Law. It has been frequently amended, but so far as this case is concerned the only pertinent amendments are those contained in Act 331 Michigan Public Acts 1927. This explains why we place after a quotation either the date 1923 or 1927, which indicates whether the provision in the form applicable to this case appears in Act 316 of 1923 or Act 331 of 1927.

We divide these quotations between the drain law and general tax law.

DRAIN LAW PROVISIONS

Ch. VI, Sec. 1—"Upon the release of the right of way and damages or upon the determination and return of the special commissioners, the commissioner shall make his final order of determination establishing the drain, which drain shall be divided into convenient sections for the letting of contracts. A certified copy of said order of determination shall be filed with the county drain commissioner within five days after such order is made. He shall before the day of letting and review, apportion the per cent of the cost of construction of such drain which any township, city or village traversed or benefited thereby shall be liable to pay by reason of the benefit to the public health, convenience or welfare, or as the means of improving any highway under the control of such township, city or village. He shall apportion the per cent of the cost of construction of such drain which any highway then under the control of the county or district road commissioners shall be liable to pay by reason of benefits therefor, and as the means of improving such highway. He shall also apportion the percent of the cost of construction of such drain which any state trunk line highway, under the control of the state highway commissioner, shall be liable to pay by reason of benefits therefor and as the means of improving said highway. He shall also apportion the per cent of benefits to accrue to any piece or parcel of land by reason of the construction of such drain over and above the per cent apportioned to any township, city or village at large or to any highway as above provided. Such per cent so apportioned when finally approved shall be assessed against such townships, cities and villages and against the county at large

by reason of the improvement of the highways within the drainage district, and against the state by reason of the improvement of the state trunk line highways within such drainage district, and against all parcels of land therein according to such apportionment of benefits as herein provided. The apportionment of benefits so made shall be subject to review and correction and may be appealed from as in this act provided. The board of supervisors at its October meeting each year shall make provision by proper assessment of the amounts apportioned against any highway under the control of the county and district highway commissioners." (1927.)

Note: This is also Sec. 4892 C. L. 1929 and Sec. 11.56 M. S. A. This is quoted merely to show procedure preliminary to levying of original assessment.

Ch. VI, Sec. 4—"The commissioner shall give notice for the holding of a public meeting, at which a review will be had of the apportionment of benefits made as aforesaid and also for the purpose of letting a contract or contracts for the construction of such drain. Notice of such hearing shall be given by publishing a notice thereof, at least two insertions in some newspaper published and of general circulation in the county, if there is one. Such notice shall be so published at least once not less than ten days prior to the hearing. The commissioner shall also give notice of such hearing by posting notices thereof in five conspicuous and public places in each township where the district is located, within the limits of said districts at least ten days prior to such hearing: Provided, That in all cases where the apportionment of benefits shows less than one hundred descriptions upon which benefits have been apportioned, personal service shall be had upon all resident land owners within the drainage district, at least ten days prior

to such hearing or by leaving a copy of said notice at the residence of such property owner with some person of suitable age and discretion. As to all other land owners, notice shall be given by posting and publication as above provided. Such notice shall also be personally served upon any of the county road commission and the supervisor of each township affected, the mayor of each city and the president of each village. Such notice shall contain the names of all counties, cities, townships or villages affected. Such notice shall contain a description of the several tracts or parcels of land constituting the special assessment district of such drain: Provided, That it shall not be necessary to subdivide any tract or parcel beyond the point where the whole thereof is within such drainage district or to describe the said drain further than by reference to it by its name or number, and it shall also state the number and length of sections; the average depth and width of each section; and in case of tile drains, the amount and specifications of all tile required; the location, number, type and size of all culverts and bridges and the conditions upon which said contract or contracts will be awarded; and in no case shall said notice contain the minutes of survey or table of cuttings which shall be kept on file in the office of the drain commissioner and be open to inspection at the time and place of such letting, and that at the time and place of such letting, or at such other time and place thereafter to which the county drain commissioner may adjourn the same, the apportionment of benefits and the lands comprised within the special assessment district shall be subject to review for at least one day; such review shall be held open from nine o'clock in the forenoon until five o'clock in the afternoon. On such reviews the county or district road commission may appear in behalf of the county, the supervisor or commissioner of highways of any township may appear on behalf of such township; the

mayor or some officer of the city designated by him may appear for such city, the president may appear in behalf of such village, and any district or county road commission may appear for such district or county. At such review the county drain commissioner shall hear the proofs and allegations of all parties interested, and shall carefully reconsider and review the description of land comprised within the special assessment district, the several descriptions and apportionment of benefits, and define and equalize the same as may seem just and equitable, and shall fix the number of installments for the collection of drainage taxes. Whenever an apportionment of benefits shall be made against a state trunk line highway, the drain commissioner shall at least twenty days before the review thereon, notify by registered mail the state highway commissioner of the percentage apportioned against such highway and the date and place fixed for the review of all apportionment of benefits. If the state highway commissioner desires to have such apportionment of benefits reviewed by the state commissioner of agriculture, he shall within ten days from the receipt of such notice, file with the drain commissioner an objection to the apportionment. The drain commissioner shall then notify the state commissioner of agriculture of the day and place fixed for such review of apportionments and at such meeting the commissioner of agriculture or some deputy selected by him, shall review the apportionment made against the said state trunk line highway, listen to the proofs and allegations of the parties and may view the highway benefited, and his action and decision thereon, reduced to writing, shall be final." (1927.)

Note: This is also Sec. 4895 C. L. 1929 and Sec. 11.59 M. S. A., but in latter are some changes made in 1931 not believed to be material. Quoted for same reason as preceding section.

Ch. IX, Sec. 3—"Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same, and to pay all the costs and incidental expenses or to pay the principal and interest on bonds if such are issued, a further assessment shall be made to meet the deficit or additional expense. Such further assessment shall be apportioned, assessed, levied and collected as provided in the first instance, and on the same percentage, and shall be collected in one year, but there shall be no review of nor appeal from such further assessment."

Note: This is also Sec. 4917 C. L. 1929 and Sec. 11.81 M. S. A., but in each is an amended added by Act 39 P. A. 1931. This is quoted in Appellees' Brief p. 15 and in Reply Brief p. 15.

Ch. X, Sec. 1—"Within ten days after the letting of contracts, or in case of an appeal, then forthwith after such appeal shall have been decided, the commissioner shall make a computation of the entire cost of such drain which shall include (1) all the expense of laying out and designating the drainage district, which item of expense shall include the entire cost of the survey; (2) the expense of locating, establishing and constructing the drain; (3) the fees and expenses of special commissioners; (4) the compensation to be paid the board of review; (5) the cost of construction of bridges and culverts; (6) the contracts for the construction of the drain, or other work to be done on said drain; (7) the estimated cost of an appeal in case the apportionment made by the commissioner shall not be sustained; (8) the expenses of the state commissioner of agriculture, where called; (9) the cost of publishing all notices required; (10) and all fees of the probate judge, and he shall add the whole into a gross sum and add thereto five per cent of said gross sum to cover contingent expenses

and the entire sum so ascertained shall be deemed to be the cost of construction of such drain." (1923.)

Note: This is also Sec. 4923 C. L. 1929 and Sec. 11.87 M. S. A., but in these compilations are some slight changes made by Act 318 P. A. 1929. Quoted to show procedure.

Ch. X, Sec. 2.—"The commissioner shall thereupon make a special assessment roll for such drain for each county, township, city or village and each state trunk line highway affected thereby, which roll shall be designated, '(giving name or number) drain special assessment roll,' and he shall enter therein a correct description of the tracts, parcels or subdivisions of land benefited by such drain and place opposite each description the amount of the per cent heretofore determined upon by him or by the board of review, as the case may be. He shall also enter thereon the amount of the per cent apportioned to each county, township, city or village, and each state trunk line highway, and in case such amount be payable in installments, he shall also enter thereon a memorandum of the installments thereof and of the year or years when such installments shall be spread; and shall add a certificate in writing of the determination whether the taxes assessed for benefits shall be paid in one or more years. Such rolls shall be dated and signed by said commissioner and filed on or before the last Wednesday in September in each year, in the office of the county clerk.

"The commissioner shall prepare a tax assessment roll in each year for the collection of taxes for the current year, and shall certify the same to the county clerk on or before the first day of the annual meeting of the board of supervisors. In each such roll he shall add to the amount to be collected, interest on all unpaid installments to the date of tax collection. To the roll for the last year he shall add

such further amount, if any, as may be necessary together with outstanding uncollected taxes, to pay all outstanding bonds and interest thereon to maturity." (1927.)

Note: This is also Sec. 4924 C. L. 1929 and Sec. 11.88 M. S. A., but in these compilations are some slight changes made by Act 318 P. A. 1929. Quoted previously in part in Reply Brief p. 16.

Ch. X, Sec. 5—"All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. Drain taxes, when collected, shall be returned to the county treasurer to be disbursed by him. In all cases where suit is brought against the collector arising out of the collection of any drain tax, the county shall defend such officer in the same manner that he has now the right to be defended in the collection of general taxes. No suit shall be instituted to recover any drain tax or money paid or property sold therefor, or for damages on account thereof, unless brought within thirty days from the time of payment of such money to, or sale of such property by, the collecting officer; and if such tax shall be paid under protest the reasons therefor shall be specified, and the same procedure observed as is or may be required by the general tax law. All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid." (1923.)

Note: This appears in Sec. 4927 C. L. 1929 and Sec. 11.91 M. S. A. Quoted previously in Appellees' Brief, p. 2.

Ch. X, Sec. 6—"If the taxes levied for the construction, cleaning out, widening, deepening, straightening or extending of any drain are not collected by the township, city or village treasurer, they shall by him be returned, together with the lands upon which they were levied, to the county treasurer in the same return, at the same time, and in the same manner, in every respect (naming in each case the particular drain), as lands are returned for state, county and township taxes, and such taxes shall follow such lands, the same as all such other taxes, and all the general provisions of law now existing, or that may be hereafter enacted for enforcing the payment of township, county and state taxes, shall apply to such drain taxes, and to the lands returned delinquent therefor, in the same manner and with like effect." (1927.)

Note: This appears in Sec. 4928 C. L. 1929 and Sec. 11.92 M. S. A. Quoted because it completes prior section.

Ch. X, Sec. 10—"Whenever any drain has been located and established, and contracts let for its construction, and the work of construction has been completed, or partly completed, and the commissioner has made his order establishing the drain, his apportionment of benefits and special assessment roll and filed the same in the office of the county drain commissioner, as provided by this act, and such taxes remain a perpetual lien upon the lands assessed, and filed all of said papers in the office of the county drain commissioner, and no person or municipality affected by the proceedings has taken any action by virtue of section eleven of chapter six of this act to test the validity of the proceedings, or to set the same aside, and it shall further appear that the tax has not been spread on the tax roll of the municipalities affected and the lien of said tax still remains against such lands, on the application in writing of any person or corporation who is now or were owners of the land assessed at the time of the apportionment of

benefits by the commissioner or any person or corporation, who were the owners of land at said time and who were assessed therefor, and who sold such land with covenants of warranty, may make an application in writing to the county drain commissioner setting forth such facts and upon the filing of such application, it shall be the duty of the county drain commissioner to make a certified copy of the assessment roll filed in his office by the commissioner and present to and lay it before the board of supervisors at the first October session thereafter of said board and thereupon it shall be the duty of said board at said session to order and direct such taxes spread upon the tax roll of the municipalities affected thereby, according to the said assessment filed as aforesaid, and as appears by such special assessment roll, or certified to said board. The provisions of this section shall also apply to drains laid out and established and wholly or partly constructed under the provisions of all drain laws in force prior to the passage of this act, where such laws have made such drain tax a perpetual lien upon the lands upon which they are assessed." (1927.)

Note: This appears in Sec. 4932 C. L. 1929 and Sec. 11.96 M. S. A. Quoted as having a possible bearing on question as to whether there is a lien before an assessment is made.

Ch. X, Sec. 13—"In case any drain tax heretofore or to be hereafter assessed, shall be set aside except for causes that would deprive the commissioner of jurisdiction to construct the drain, the commissioner may begin proceedings anew at the stage where they shall be correct. In case a drain tax can or may be set aside for error in description or other defects in the commissioner's or township treasurer's roll, the commissioner shall report the same to the board of supervisors at their October session, who shall order the same reassessed upon the proper description.

Such report may be made at any time before the sale of the land for such tax." (1923.)

Note: This appears in Sec. 4935 C. L. 1929 and Sec. 11.99 M. S. A. Quoted to show difference between *reassessment* and *additional assessment.*

Ch. X, Sec. 15—"In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than one installment, said commissioner by and with the written approval of the judge of probate and the county treasurer of the county, may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage districts as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installment of taxes, shall mature not earlier than March first nor later than June first of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed fifteen and the amount of each installment shall be fixed by the commissioner to correspond as near as may be to his estimate of the amount of taxes actually collectible each year. The commissioner shall prescribe the form of the bond by and with the written approval of the judge of probate and the county treasurer of the county, shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby: Provided, That the written consent as above set

forth of any judge of probate or county treasurer shall not be required in proceedings relating to inter-county drains. Such bonds shall be advertised and sold by the drain commissioner after the manner provided for the advertisement and sale of municipal bonds by act number two hundred seventy-three of the laws of nineteen hundred twenty-five and any amendments which may be made thereto governing such advertisement and sale. If any premium is received thereon such premium shall belong to the fund of the drain. The proceeds derived from the sale of such bonds shall be deposited with the county treasurer to the credit of the drain fund. The county treasurer shall safely keep all such bonds until sold as above provided. In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore or hereafter issued when they become due the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the county shall not cause the total debt of the county to exceed the constitutional limitation thereof." (1927.)

Note: This appears with later amendments in Sec. 4937 C. L. 1929 and Sec. 11.101 M. S. A. Quoted p. 3 Appellees' Brief.

Ch. X, Sec. 16—"In cases where bonds are issued and sold by the commissioner all installments of the drain taxes shall bear interest at the rate of six per cent per annum from the date of the preparation of the assessment roll until due. Such bonds may provide, if the commissioner so determines, for the payment of interest semi-annually. All of said installments and the interest thereon shall, as collected, be paid into the county treasury and there placed to the credit of the fund of the drain to be used solely for the payment of bonds as the same shall mature. All moneys thus collected in anticipation of the maturity of the bonds

shall be deposited by the county treasurer in a bank or banks to be designated by the board of supervisors of such county and the interest received shall belong to the fund: Provided, however, That any bank receiving county drain funds hereunder shall give bond to the county treasurer in an amount not less than the sum so deposited." (1927.)

Note: This appears in Sec. 4938 C. L. 1929 and Sec. 11.102 M. S. A. Quoted because it completes prior section.

Ch. X, Sec. 17—"Any person liable to the payment of special assessments for benefits received from the construction of a drain hereunder may pay the same in full without interest when the first installment is due. Such payment shall be made to the township treasurer who shall give his receipt therefor, and who shall transmit the same to the county treasurer. The latter official shall on receipt of the same give notice to the commissioner who shall make the necessary changes in the rolls covering subsequent installments." (1923.)

Note: This appears in Sec. 4939 C. L. 1929 and 11.103 M. S. A. with slight changes made by Act 318 P. A. 1929. Quoted to show permission to pay original assessment in full, and because subsequent section refers to it.

Ch. X, Sec. 18—"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, whether such insufficiency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and

interest shall remain in the county treasury and be used for the maintenance of the drain." (1927.)

Note: This appears in Sec. 4940 C. L. 1929 and Sec. 11.104 M. S. A. Quoted R. 42 and p. 4 Appellees' Brief. This section constitutes basis of appellants' claim.

GENERAL TAX LAW PROVISIONS

There seems to be no disagreement as to meaning of provisions quoted in our appendix from pages 30 to 34. Several of the provisions starting with 7.181 on page 34 we give in complete form.

Sec. 127—"Lands delinquent for taxes for any five years, where said lands have been sold and bid off to the state for the taxes of one or more of the said years, and then so held, and no application having been made to pay, purchase or redeem the said lands for said taxes and no action pending to set aside such taxes or to remove the cloud occasioned thereby, shall, within the meaning of this act, be deemed abandoned lands, unless such lands are actually occupied by the person having the record title thereto. Any lands delinquent for taxes for a period of five or more years, and said lands having been sold and bid in by the state and held by the state for the taxes of any of said years, and no application having been made to pay, redeem or purchase the same, and no suit pending to set aside said taxes or remove the cloud from the title occasioned thereby, shall be subject to the provisions of this section. Whenever it shall appear by the records in the auditor general's office that any lands are delinquent for taxes for five years or more and that said lands have been bid off to the state one or more times by reason of such delinquent taxes, and that the time of redemption of such sale or sales has expired and that no

application has been made to pay, to redeem or purchase the same, and it shall appear that no action is pending in the circuit court of the county where said lands are situated to set aside the taxes or remove the cloud on the title occasioned thereby, the title to the state shall be deemed absolute in and to said lands; and it shall be the duty of the auditor general and the director of conservation to cause an examination of such lands to be made as soon as practicable, to ascertain their value and if abandoned. Said lands shall be withdrawn from sale by the auditor general pending such examination and the determination hereinafter referred to. Upon the examiner filing a certificate as to said examination and the occupancy of said premises, and the certificate of the county clerk of the county where said lands are situated, in the office of the auditor general, showing that no suit is pending in said county to set aside any of said taxes or remove the cloud occasioned thereby, the auditor general and the director of conservation shall determine what lands so examined come within the provisions of this section, and record their determination in a book to be kept in the office of the auditor general for that purpose. The finding and determination of the auditor general and the director of conservation shall show:

First, A description of said lands;

Second, The years for which they have been returned delinquent for taxes;

Third, The time or times bid off to the state, and the taxes for which said bid was made;

Fourth, Whether said lands are occupied or abandoned;

Fifth, Whether or not any suit is pending in the county where said lands are situated to set aside the taxes, or any of them, or to remove the cloud occasioned thereby.

The determination of the auditor general and the director of conservation in that regard shall be deemed to be conclusive as to the facts therein stated, unless suit is instituted to vacate the same within six months, as hereinafter provided. Within ninety days after such determination the auditor general shall make a transfer by deed of all lands so determined by the auditor general and said director of conservation to come within the provisions of this section to the state of Michigan as to an individual, as provided in section seventy-two* of this act so far as said section is applicable, and such lands shall be withdrawn from sale pending the execution of such deed. Said deed or deeds shall be delivered to the director of conservation, who, after having said deed or deeds recorded in the register of deeds office of the county where the lands are situated, shall file the same in his office. Upon the execution and delivery of said deed or deeds to the director of conservation, said director shall hold said lands as state lands, subject to the provisions hereinafter contained. And no suit shall be instituted to vacate, set aside or annul the said determination of the said auditor general and the director of conservation made as aforesaid unless instituted within six months after the determination aforesaid. Any person desiring to file a bill or institute a suit to vacate the findings of the auditor general and director of conservation, as provided in this section, shall first pay to the auditor general all delinquent taxes returned to the auditor general on the lands in question, together with all interests, costs and charges, and shall purchase and pay for all bids and titles held by the state to such lands by paying therefor

*Section 72, C. L. 3464, referring to tax deeds, says: "Such deeds shall convey an absolute title to the land sold, and be conclusive evidence of title in fee in the grantee, subject, however, to all taxes assessed and levied on such lands subsequent to the taxes for which the same was bid off."

the amount bid by the state and all interest and legal charges thereon, as provided in section eighty-four of this act. The money so received by the auditor general shall be paid into the general fund of the state and in case the determination of the auditor general and director of conservation should be set aside and held for naught, and the taxes, or any portion thereof, shall be adjudged invalid for any of the reasons set forth in section seventy-six of this act, then in such case the auditor general shall return to the person entitled thereto such taxes, or any portion thereof, as shall be so adjudged invalid for the reasons aforesaid, and in case the title is held valid the money so received shall be divided between the state, county and township pro rata according to the taxes paid, the same as in other cases. Any suit instituted for the purpose of setting aside the determination aforesaid may be commenced in the circuit court of the county of Ingham. It is hereby made the duty of the county clerks of the several counties of this state, on inquiries by the auditor general, to furnish to said auditor general a certificate showing whether or not any such suit is pending in the circuit court of the counties, as above referred to, relating to any lands described and referred to in the inquiry of the auditor general."

Note: This is Sec. 3520 C. L. 1929 and Sec. 7.181 M. S. A. Portion of this quoted page 34 of appendix to first brief.

Sec. 130—"All taxes charged against such lands in the office of the auditor general at the time they are deeded to the state shall be canceled, but no part of such taxes due to the township or county shall be charged to the state, but the state, county and township respectively shall bear the share of loss on such taxes that properly belongs to each, and the auditor general shall make a list of all such lands in each

county on or before the first (1st) day of March in each year and transmit such list to the county treasurer and the county treasurer shall serve, or cause to be served, upon the supervisor of the township in which such lands are located a copy of the list of lands in such township as furnished to said treasurer by the auditor general. Said supervisor shall produce said list to the board of review while in session for the purpose of reviewing the assessment roll. The supervisor shall omit and cancel from his assessment roll all said lands so deeded to the state, as shown by said list, and it shall also be the duty of the board of review, when in session, to compare the assessment roll of the township with the list so furnished by the county treasurer, as aforesaid, and correct all mistakes, and said lands so deeded as aforesaid shall not be liable to any assessment for any purpose until the same are again sold and deeded by the state, and notice of said sale and deeding given to the county treasurer by the commissioner of the state land office, as hereinafter provided."

Note: This is Sec. 3524 C. L. 1929 and Sec. 7.185 M. S. A. Portion quoted page 35 appendix to first brief. Some construction of this language appears in *Case v. City of Saginaw*, 196 Mich. 687.

Sec. 131—"All such lands shall be held by the director of conservation subject to entry as homestead lands unless withheld and reserved in the manner following: The director of conservation and the auditor general, acting jointly, may reserve and withhold from entry under the homestead right such portion of the lands deeded by the auditor general to the state under section one hundred twenty-seven of the act number two hundred six of the public acts of eighteen hundred ninety-three and acts amendatory thereto as, in their opinion, it may not be advantageous to open for homestead. The director of conservation may also,

with the approval of the conservation commission, withhold from entry under the homestead right and sale, such lands as he may determine to be suitable for state forests, state parks, state game refuges, public hunting or recreational grounds. The said director of conservation and auditor general may affix a minimum price upon any such land not so reserved and withheld. All such lands not so withheld from sale shall be offered for sale by said director of conservation at prices to be discretionary with him: PROVIDED, That in the sale of these lands not so reserved and withheld, the same rules and regulations as provided in act number twenty-one of the public acts of eighteen hundred seventy-three, entitled "An act to require the commissioner of the state land office to give public notice of the restoration of reserved and forfeited state lands to market," shall govern, and no bid shall be accepted for less than the minimum price affixed by such director of conservation and the auditor general. The proceeds from any such sale shall be accounted for to the state, county and township in which said lands are situated pro rata according to their several interests therein, arising from the non-payment of taxes thereon as such interest shall appear in the office of the auditor general. If any person shall apply for any lands not withdrawn from sale as provided herein not to exceed in quantity one hundred sixty acres, or if, within the limits of the plat of any city, or village, not to exceed the contiguous lands in any one block, or two contiguous parcels of unplatted land, for any one person so applying, and shall file an affidavit that such person desires such lands for actual settlement, for the purpose of a homestead, the director of conservation shall, if in his judgment, the application is made in good faith, issue a certificate to such person for such land upon the payment of the sum of ten cents per acre, conditioned that such person shall reside upon said lands for the

period of five years and improve the same: PROVIDED, That in case such lands are included in the plat of any city or village, or of any subdivision of or addition to any city or village, the land that may be taken as a homestead by any person shall be contiguous and shall not exceed one block, according to such plat, or two contiguous unplatted parcels, except where such city or village lands have been bid to the state by government description, in which case no person shall receive a certificate for more than one government description, and in the case of any such lands the amount paid therefor shall be the same for any parcel less than one acre as for one acre as provided in this section. At the expiration of such five years such person shall be entitled to make and shall make proof of the fulfillment of such contract within three months in such manner as the said director of conservation may prescribe. And when such proof is made to the satisfaction of said director of conservation such person shall be entitled to a deed of such land from the state, executed by the director of conservation on behalf of the state, which deed shall be in such form as the director of conservation shall determine; the said deed shall be witnessed and acknowledged and shall be entitled to record in the office of the register of deeds in the proper county, in the same manner and with like effect as other deeds are duly witnessed, acknowledged and certified. Such deed shall convey an absolute title to the lands sold, and shall be conclusive evidence of title in fee in the grantee, and it shall be the duty of the state of Michigan to defend and prosecute all suits brought to protect such title, and the state shall pay all costs adjudged against the homesteader. Such homestead lands shall be subject to the same rules and regulations now in force as to other homestead lands not inconsistent with the provisions of this act. Persons who have heretofore taken up homestead lands under this section, having made the first

payment required by this section, and having resided upon and improved the same since they entered thereupon, are hereby relieved from making any further payments to the state: PROVIDED FURTHER, That nothing in this section shall be construed to entitle any person or persons who have heretofore entered such lands to the return of any part of the payments heretofore made by them. And PROVIDED FURTHER, That any person who has purchased and entered into possession of any lands as a homestead, under and by virtue of the provisions of this section, as originally passed, or amended when said lands had been bid off to the state and were held by the state for the taxes of one or more years, and said lands were delinquent for taxes for three or more years, shall, on performing the other conditions of said section, as amended, receive a deed therefor, as herein provided, and shall be deemed to have a good, sufficient fee-simple title to said premises, to all intents and purposes the same as though said lands had been bid off to the state for a consecutive period of more than three years, as originally provided in section one hundred twenty-seven of said act. And in all cases where the lands have been taken as a homestead as set forth in last foregoing proviso, all actions of ejectment or to recover possession of said lands or to set aside the title of such homesteader by any person, firm or corporation claiming the original or government title, shall be commenced within six months after this act shall take effect, and not afterwards. Said person, firm or corporation shall before commencing such proceedings pay to the auditor general all delinquent taxes returned to the auditor general on lands in question, together with all interest, costs and charges, and shall purchase and pay for all bids and titles held by the state to such lands by paying therefor the amount bid by the state and all interest and legal charges thereon, as provided in section eighty-four of this

act. The money so received by the auditor general shall be deposited in the state treasury to the credit of the state, county and township wherein said lands are situated, in proportion to the amount of taxes due to the state, county and township upon said lands; and in case the state's title to the land shall be declared valid, then the taxes and moneys so paid by the person, firm or corporation instituting such suit of ejectment shall be returned upon the order of the auditor general, less the costs of such suit. And it shall be the duty of the state of Michigan to prosecute and defend suits and pay costs as herein provided: PROVIDED FURTHER, That in case written application shall be made to the director of conservation to purchase any description of said lands not so withheld from sale or homestead right by the state it shall then be the duty of the director of conservation to examine and appraise the value of the land so offered to be purchased as aforesaid. The director of conservation shall make a record of said appraisement, in a book to be kept in his office for that purpose. After such examination and appraisement, if there has been no application to homestead said lands, and if the director of conservation with the approval of the conservation commission does not elect to withhold said lands from the homestead right, and sale, as provided herein, it shall be competent and the director of conservation is hereby authorized to sell such description of land to any person so applying for the purchase thereof, but at not less than the appraised valuation, and he shall not be authorized to sell to any one person over two hundred and forty acres of said land. In case of the sale of said lands, the director of conservation shall execute and deliver to the purchaser a deed in such form as he may determine, which shall convey to the purchaser the same interest as is provided for a deed where said lands have been homesteaded as provided in this section.

All moneys received by the director of conservation upon the sale of said lands as provided under the last above proviso shall by him be deposited in the state treasury, to the credit of the state, county and township wherein said lands are situated in proportion to the amount of taxes due to the state, county and township upon the land so sold by the director of conservation at the time of the conveyance to the state of such lands: And PROVIDED FURTHER, That on all lands withdrawn from sale or homestead right as herein provided, there shall be paid by the auditor general, upon a certificate of the director of conservation containing a list of such lands and the location thereof, to the county treasurer of the county in which such lands are located, an amount equal to twenty-five cents an acre upon each acre of land so withdrawn, which sum shall be distributed by the county treasurer as follows: One-fourth of such sum so paid shall be credited to the general fund of the county; one-fourth to the general or contingent fund of the township in which said land is located and one-half to the school district in which said land is located. Said sum or sums so paid by the auditor general, shall be charged by him to the general fund of the state, and when so paid shall constitute a settlement and satisfaction of any and all claims of said county, township and school district for taxes assessed against said lands, and shall discharge and extinguish any and all claims or liens for taxes by such county, township and school district. Upon the payment of such sum or sums as aforesaid, the title in and to such lands shall be absolute in the state of Michigan, as against said county, township and school district."

Note: This is Sec. 3527 C. L. 1929 and Sec. 7.188 M. S. A. Not previously quoted. Deemed necessary because it shows procedure for disposition of lands forfeited to state.

Sec. 133—"Whenever any person has perfected his title to any such lands, and a deed for the same has been issued by the state to such person, the commissioner of state land office shall so notify the county treasurer of the proper county that such lands are again and thereafter taxable as other lands. And they shall thereafter be assessed to such owner or occupant as other lands are assessed for all purposes. The county treasurer shall serve, or cause to be served upon the supervisor of each township in which such lands are located, on or before the fifteenth (15) of April, a copy of the list of lands in his township, so furnished to said county treasurer by the commissioner of the state land office. Said supervisor shall produce said list to the board of review, while in session, for the purpose of reviewing the assessment roll, and all such lands shall be placed upon the assessment roll: Provided, that if any homesteader upon any of the lands so deeded to the state and held for homestead entry shall surrender his certificate to the state for the benefit of any other applicant, and if such new applicant shall be granted a certificate, the said land shall become subject to assessment as real estate after the expiration of five (5) years from date of the original entry."

This is Sec. 3529 C. L. 1929 and Sec. 7.192 M. S. A. Not previously quoted. Should be read in connection with Sec. 130. Specifies taxability of land after it is returned to private ownership.

We do not deem it necessary to enlarge quotations of the 1937 Statutes appearing on pp. 36 to 39 of appendix to our original brief.

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

REPLY TO "SUPPLEMENTAL CITATIONS FOR APPELLEES"

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REPLY TO "SUPPLEMENTAL CITATIONS FOR APPELLEES"

A document prepared by counsel for Appellees entitled "Supplemental Citations for Appellees" has been received. As this contains considerable argumentative material, we believe that we should be entitled to answer the same, and that it would be helpful to the court to know our views.

The question is raised as to whether it was necessary for the lower court to consider Acts 114 and 155, Michigan Public Acts 1937, and appellees argue that prior to these enactments the law was such that the lower court would have been correct in arriving at the conclusion which it reached, without any reference to the 1937 legislation. In other words, appellants say that if, under the laws existing when the bonds were issued, a parcel of land was acquired by the state through forfeiture as a result of tax delinquency, it would after return to private ownership be exempt from future deficiency drain assessment.

We do not believe that any of the cases cited by appellees sustain that proposition.

Auditor General v. Clifford, 143 Mich. 626, does not present a question of land becoming exempt from newly levied taxes. A party who had bought land from the state when the record showed that prior taxes had been cancelled because of errors was protected against a subsequent imposition of the same taxes on the ground that the auditor general was estopped by his record. Nothing said by the court indicates a view that the purchaser's title was not subject to such taxes as might in the future be levied under any applicable law.

Krench v. State of Mich., 277 Mich. 168, merely holds that when the state conveys a title it may reserve mineral rights. This is merely a recognition of the right of any owner of land to reserve from any grant such interests as he wishes. The state, however, cannot as an incident to the grant of land make it exempt from taxes. That was forbidden by the State Constitution, Section 9, Article X (cited R. 42) providing "The power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any municipal corporation shall be a party."

Meltzer v. State Land Office Board, 301 Mich. 541, merely holds that a new chain of title starts after the state acquires title, and that a former owner has nothing to convey after he has lost title. It does not hold that a drain commissioner is prevented by the deed from the state from levying a deficiency drain assessment against the land after it has gone into private ownership.

Lindsay v. Eastwood, 72 Mich. 336, holds that the lien for a drain assessment becomes fixed when the commissioner makes the assessment and not when it is placed on the tax rolls for collection. *Jacobs v. Union Trust Co.*, 155 Mich. 223, is opposed to appellees' theory for it holds that there is no lien until the amount of the tax or assessment is ascertained and has become a charge which may be discharged by payment. Since there never has been a deficiency assessment, and no way of knowing what it would be if levied, there never has been a lien created for it, which could be discharged by payment.

We agree that the original assessment for $300,000 became a lien prior to the issuance of the bonds, but that is not the same as saying that there was a lien for anything except the amount specified in the original assessment roll as against each parcel. It is therefore inaccurate for appellees to say, as they do on page 7 of their memorandum, "that the lien for the entire cost, in the percentages fixed, attached in 1927." The cost of a drain is not a lien without action being taken by the officers in making the assessment. The original lien may be extinguished by acquisition by the state, but that only does away with the lien for that assessment. If a deficiency levy is made, the lien for it dates from the making of such levy and not from the date of the existence of the drain district debt. We are not concerned here with the deferred installments of the original levy, since there is no claim here that any of such

deferred installments should be imposed upon the scavenger sale lands. The deficiency levy is not a deferred installment of the original levy, but an entirely new levy.

Dawson v. Aurelius Twp., 49 Mich. 479, and *Cooper v. Little*, 220 Mich. 62, have no bearing on this case. We do not claim that any township is responsible for this debt, except to the extent that two townships are assessed for a portion of the cost of the drain, and are subject to deficiency assessments as the law provides. The cases really support our statement that the drain district is a separate entity, and is not merely an assessment district created by some other municipal corporation, as was the situation in *Municipal Investors Assn. v. Birmingham*, 298 Mich. 314.

Appellees make no mention of the language of the statutes as they existed prior to 1937 relating to disposition of lands forfeited to the state, which we believe clearly negatives the view that land could by mere acquisition by the state become exempt from a deficiency assessment, after its return to private ownership. The opening sentence of Sec. 3524 C. L. 1929, Sec. 7.185 M. S. A., quoted p. 18 of our Amplification of Appendix to Appellants' First Brief, shows that the only taxes cancelled when the state acquired title were those charged in the office of the auditor general at the time the lands were deeded to the state. As the only taxes which can be charged in his office are those which have become delinquent and as no deficiency levy has yet been made, it could not be cancelled. *Case v. City of Saginaw*, 196 Mich. 687. Nor do they note Sec. 3529 C. L. 1929, Sec. 7.192 M. S. A., appearing p. 25 of our amplification, which says that after state tax lands are conveyed "they shall thereafter be assessed to such owner or occupant as other lands are assessed for all purposes." We fail to see how the legislature could have more clearly manifested an intent to avoid any implication that the

state's deed should create any exempt status whatsoever. Such lands were not to be treated in any way different than if they had never been owned by the state. By giving effect to this language the statute is in harmony with the general exemption laws appearing in the appendix to our first brief, p. 30, which forbid exemptions by implication.

These statutory provisions in the general tax law cannot be ignored in passing on the question of whether it was necessary for the lower court to consider the 1937 legislation in arriving at its conclusion. As the law existed when the bonds were issued no exempt status resulted from forfeiture by the state and subsequent resale to a private party.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

MOTION TO DISMISS OR AFFIRM.

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STATUTES CITED.

Act 316 of the Michigan Legislature of 1923, Section 18, Chapter 10	3
Constitution of the United States, Article I, Section	
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Public Acts of Michigan of 1937, Act 155	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE AND WALLACE D. BRADFORD,
Appellants,

vs.

EARL L. CLARK, DRAIN COMMISSIONER OF OAKLAND COUNTY, MICHIGAN, AND BOARD OF SUPERVISORS OF OAKLAND COUNTY, CITY OF ROYAL OAK.

ALTERNATIVE MOTION TO DISMISS OR AFFIRM.

Come now the Appellees, Earl L. Clark and Board of Supervisors of Oakland County and Intervened Appellee, City of Royal Oak and respectfully move this Honorable Court to dismiss the Appeal heretofore ordered in the above entitled cause on December 16, 1943 and or in the alternative, to affirm the decision of the Michigan Supreme Court rendered October 11, 1943.

As reason for this Court to grant Appellees motion they represent as follows:

First, that the question as to whether or not Act 114 of the Michigan Public Acts of 1937, as amended by Act 282 of Michigan Public Acts of 1939 and Act 234 of Michigan Public Acts of 1941 (par. (a), page 4 of Appellants "Petition for appeal from the Supreme Court of Michigan to the Supreme Court of the United States), was or was not vio-

lative of Article 1, Section 10 of the Federal constitution, was never presented to the Oakland County Circuit Court nor the Michigan Supreme Court, and under the well established rules of this Court is not reviewable.

Second, Appellants "Statement of Questions Involved" in the brief filed in the Michigan Supreme Court were as follows:

> 1. When lands in a drain district have passed through a scavenger sale under Act 155, Public Acts 1937, as amended, and are again privately owned, are they exempt from additional deficiency drain taxes provided under Act 129, Public Acts 1939?
>
> The Lower Court said "Yes."
> Appellants contend answer should be "No."
>
> 2. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article X, Section 9, of the State Constitution?
>
> The lower court impliedly said "No."
> Appellants contend answer should be "Yes."
>
> 3. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article I, Section 10, of the Federal Constitution, and Article II, Section 9, of the State Constitution?
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> The court impliedly said "No."
> Appellants contend answer should be "Yes."
>
> 4. Do municipalities, against which an at large tax is spread, and lands which have not passed through a scavenger sale, become exempt from a deficiency levy under Act 129, Public Acts 1939?
>
> The court said "Yes."
> Appellants contend answer should be "No."

In paragraph 3 above is the only reference to the Federal constitution, Article I, Section 10, and that in reference to

Act 155 of Public Acts of Michigan for 1937, as amended, but no contract relation complained of was created or violated between the State and the Appellants or the Appellees and the Appellants, or any other persons, because of sale under Act 155, hence there is no question of impairment of contract which would give this Court jurisdiction.

Thirdly, if the statutes existing at the time the bonds were sold (Act 316 of 1923, Section 18, Chapter 10) were part of their contract and gave Appellants the rights they claim are here impaired, namely the right to a deficiency spread and perpetual liens against all of the lands in the drain district, those rights were taken away by operation of Act 114 of 1937, the constitutionality of which was not challenged in the Michigan Supreme Court and cannot be challenged here.

Fifth, the only contractual right created by Act 155 of 1937 was the right of the drain district to share in the proceeds of the sale of the lands the State owned free and clear by virtue of the operation of Act 114 of 1937, and each drain district has received such monies including the East Clawson Storm Sewer Drain District here involved.

This motion is based on the files and record in this Court and cause and the affidavit of counsel hereto attached and brief accompanies the same.

HARRY J. MERRITT,
Attorney for Appellees.

Business Address: County Office Building, 1 Lafayette St., Pontiac, Michigan.

WILLIAM CLARENCE HUDSON,
Attorney for Intervened Appellee.

Business Address: City Hall, Royal Oak, Michigan.

FILE COPY

United States of America

IN THE

Supreme Court of the United States

No. 631

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK,
Intervenor

BRIEF FOR APPELLEES ON MOTION TO DISMISS

HARRY J. MERRITT,
Oakland County Corporation Counsel,
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Attorney for Appellees.

WILLIAM C. HUDSON,
City Hall,
Royal Oak, Michigan,
Attorney for Intervening Appellees.

Interstate Brief & Record Co., Cass Bldg., 457 Port St. W., Detroit

QUESTIONS INVOLVED IN MOTION TO DISMISS OR AFFIRM

I.

Was the constitutionality of Act 114 P. A. 1937 under Article I, Section 10 of the Federal Constitution, challenged in the Michigan Supreme Court to a sufficient extent to give the United States Supreme Court jurisdiction to pass on the constitutionality thereof?

Appellants say "Yes."
Appellees say "No."

II.

Did Act 155 of the Public Acts of Michigan for 1937 deprive Appellants of any rights in violation of Article I, Section 10 of the Federal Constitution?

Appellants say "Yes."
Appellees say "No."

III.

Should the motion to dismiss Appellants' appeal be granted?

Appellants say "No."
Appellees say "Yes."

IV.

Should the motion to affirm the decision of the Michigan Supreme Court be granted?

Appellants say "No."
Appellees say "Yes."

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No.....

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BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK,
Intervenor

BRIEF FOR APPELLEES ON MOTION TO DISMISS

FACTS

(Applicable to Motion to Dismiss)

On June 25, 1942, Appellants filed in Oakland County Circuit Court, a petition for Declaration of Rights under section 13909 Michigan Compiled Laws for 1929.

The petition set up the fact that petitioners were the owners of 32 bonds issued by the East Clawson Storm

Sewer District, that they were due and unpaid, that they were entitled under the Michigan Drain law to a deficiency spread of assessment against all lands originally in the district including those sold by the State of Michigan under Act 155 of 1937 as amended.

Paragraph 5 of the Petition for Declaratory Judgment, which purports to raise a question under both the Federal and State constitutions reads as follows:

"5.

Petitioners are advised and believe that said questions must under the law of this State, interpreted to conform with various provisions of the Constitutions of the United States and the State of Michigan hereinafter set forth, be answered in the affirmative. Petitioners allege that Section 18, Ch. X, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927 and Act 129 Michigan Public Acts 1939, provided for *additional deficiency assessments after the bonds of said drain district had all matured, to be levied in accordance with the percentages fixed in the original assessment rolls against every parcel of land in the drain district,* except those which at the time of the additional levy are exempt by reason of an actual ownership by the State of Michigan, United States of America, or municipal corporations, (and used by them for governmental purposes), and that nothing contained in Act 155 Michigan Public Acts of 1937, as amended, or any other statutes *in pari materia,* abrogated or curtailed such provision, or could as against petitioners or other holders of bonds of said district abrogate or curtail the same, and that any interpretation of same in the manner contended by respondents would violate Article 1, Section 10, and Amendment XIV, Section 1, of the Constitution of the United States, Article II, Sections 10 and 16, and Article X, Section 9, of the Constitution of the State of Michigan."

The Oakland Circuit Court denied petitioners the relief sought and appeal was taken to the Michigan Supreme Court.

Appellants filed briefs in the Michigan Supreme Court and set up the required "Statement of Questions Involved" as follows:

> "1. When lands in a drain district have passed through a scavenger sale under Act 155, Public Acts 1937, as amended, and are again privately owned, are they exempt from additional deficiency drain taxes provided under Act 129, Public Acts 1939?
>
> The lower court said 'Yes.'
> Appellants contend answer should be 'No.'
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> 2. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article X, Section 9 of the State Constitution?
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> Appellants contend answer should be 'Yes.'
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> 3. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article I, Section 10, of the Federal Constitution, and Article II, Section 9, of the State Constitution?
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> The court impliedly said 'No.'
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> 4. Do municipalities, against which an at large tax is spread, and lands which have not passed through a scavenger sale, become exempt from a deficiency levy under Act 129, Public Acts 1939?
>
> The court said 'Yes.'
> Appellants contend answer should be 'No.'"

Appellees accepted the issues as framed in the "Statement of Questions Involved" and filed brief pointed at those issues.

Appellants filed a reply brief and in an obvious, "casual" way referred to, "Acts 114 and 155 of 1937" but did not otherwise attack the constitutionality of Act 114 of 1937. The Michigan Supreme Court was not asked to, nor did it pass on, the question of Act 114 of 1937 impairing the obligation of contract provision of the Federal constitution, that question not being before them.

ARGUMENT AND LAW

Summary of Appellees' Position

A. The Act which removed the liens of Appellants was Act 114 of Public Acts of 1937, as amended.

B. Whether or not Act 114 of 1937, as amended, violated Article I, Section 10 of the Federal Constitution was not raised in the Michigan Supreme Court, was not passed on by that court and consequently this court is without jurisdiction.

C. No contract relation was created or violated by Act 155 of 1937 as amended between the parties hereto or any other parties, hence a challenge here to the constitutionality of Act 155 of 1937, as amended, must fail.

A.

"The Act which removed the liens of Appellants was Act 114 of 1937, as amended, by Act 282 of 1939 and Act 234 of 1941,"

the pertinent portion of which reads as follows:

> "Such final decree (Decree on tax sale) shall be entered in the chancery court record for recording of decrees of such court, have the usual caption for decrees and shall be substantially in the following form. * * * It is further ordered, adjudicated and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the State, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale and all taxes, special assessments which are charged against or are liens upon such parcels and other liens and encumbrances against such parcels

of whatever kind or nature shall be cancelled as of such date unless any said parcel of land should be redeemed as provided in section 74 of Act 206 of Public Acts of 1893, as amended, or unless an appeal shall have been taken as provided in said Act * * *"

If the constitutional rights of Appellants were violated by removal of the liens, which they claim (and which Appellees deny) then Act 114 of 1937, as amended, as above quoted was the Act which violated their constitutional rights, not Act 155 of 1937 as amended.

B.

"Whether or not Act 114 of 1937, as amended, violated Article I, Section 10 of the Federal Constitution was not raised in the Michigan Supreme Court, was not passed on by that court and consequently this court is without jurisdiction."

Reference to "Statement of Questions Involved" as framed by Appellants in their brief filed in the Michigan Supreme Court (page 3, *ante*) will disclose that the constitutionality of Act 114 of 1937, as amended, was not challenged in the Michigan Supreme Court.

Reference to the decision of the Michigan Supreme Court in the instant case, 306 Mich. 503, 11 N. W. Reporter, second series, 220, will disclose that the Michigan Supreme Court did not pass on the constitutionality of Act 114 as being violative of Article I, Section 10 of the United States Constitution and presumably they did not do so because the question was not presented to them.

It is too late at this time to present the question of the constitutionality of Act 114 of 1937 as amended, as this court has declared on many occasions:

"In order to give the Supreme Court jurisdiction of a writ of error to review a judgment which the highest court of a State has rendered in favor of the validity of a statute of or an authority exercised under a State, the validity of a statute or authority must have been drawn in question on the ground of their being repugnant to the Constitution, laws or treaties of the United States. When no such ground has been presented to or considered by the courts of the State the federal Supreme Court has no jurisdiction."

Michigan Central Ry. Co. v. Michigan Southern Ry. Co., 19 How. 378, 15 L. Ed. 689;

Adams v. Preston, 22 How. 473, 16 L. Ed. 273;

Levy v. San Francisco Superior Court, 167 U. S. 175;

Miller v. Cornwall Ry. Co., 168 U. S. 131.

"The United States Supreme Court may not undertake to review decisions of State courts, unless it appears affirmatively from the record not only that the federal question involved was presented for decision to the highest court for jurisdiction, but that its decision of the federal question was necessary to determination of the cause."

Honeyman v. Hanan, 57 S. Ct. 350, 300 U. S. 14, 81 L. Ed. 476;

Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S. Ct. 528, 300 U. S. 206.

C.

No contract relation was created or violated by Act 155 of 1937 as amended, between the parties hereto or any other parties, hence a challenge here to the constitutionality of Act 155 of 1937, as amended, must fail.

The statutes in existence at the date the bonds were issued, namely, November 1, 1927, and which statutes Ap-

pellants claim are part of their bond contract, are known as Act 316 of the Public Acts of Michigan for 1923, as amended by Act 331 of the Public Acts of Michigan for 1927 and further amended by Act 129 of Michigan Public Acts for 1939, and the pertinent section thereof is found in Michigan Statutes Annotated, 11.104.

Assuming for the sake of argument that the Appellants had contractual rights under Section 18 above referred to, those rights, if impaired (which is denied) were impaired by Act 114 of Public Acts of 1937, as amended, the constitutionality of which was not challenged in the Michigan Supreme Court and cannot be challenged here.

The only remaining question then, is whether or not any contractual rights of Appellants were violated by the passage of Act 155 of 1937, as amended, the constitutionality of which is challenged.

Assuming as we must that Act 114 of 1937, as amended, is constitutional, and it has been so adjudicated in *Baker v. State Land Office Board,* 294 Mich. 587, page 598, the title to the various properties which were not redeemed by the parties in interest including Appellants as parties in interest, passed to the State of Michigan free of all liens and encumbrances. Act 155 of 1937, as amended, set up the machinery to dispose of the State owned lands which at best was a change in the remedy afforded to collect delinquent taxes. Owning the lands free and clear there was nothing to prevent the State from selling them free and clear and certainly the Appellants acquired no contractual rights by virtue of the provisions of Act 155, and Act 155 did not take away any rights Appellants had, the loss, if any, of the rights complained of having taken place under Act 114 of 1937, as amended.

Hence, we have before the court a situation where Appellants are challenging the constitutionality of an Act,

namely, Act 155 of 1937, as amended, as being violative of Article I, Section 10 of the United States Constitution which prohibits the impairment of obligation of contract when no contractual rights complained of were created or destroyed by the Act. Appellants have no standing in court under *Municipal Investors v. City of Birmingham*, 216 U. S., 152-3.

The only contractual right acquired by Appellants under Act 155 of 1937 was the following (M. S. A. 7.960, Section 10):

> "All moneys received by the state land office board, any county treasurer or the department of conservation, under the provisions of this act, and all moneys received after the expiration of this act of the department of conservation, pursuant to any sale by said state land office board on time payment plans, shall be credited to the general fund of the state, and, after first deducting such commissions and maintenance costs as are authorized in sections 4 and 8 of this act, shall be paid to the several county treasurers who shall remit the same to the several tax assessing units, including municipalities collecting their own delinquent taxes, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer or the department of conservation; Provided, however, That at the close of each fiscal year the state land office board shall deduct from interest received on land contracts during that year an amount equivalent to the operating expenses of the board for that year, which amount shall be credited to the general fund of the state (and the remainder after deducting the expense of the county treasurer in making distribution under this section shall be prorated among the several tax assessing units aforesaid, in proportion to the delinquent taxes and

special assessments of such units cancelled, as aforesaid). It shall be the duty of any county treasurer to prepare a certificate of all cancelled taxes upon any such description of land upon request by the state land office board, the department of conservation or the auditor general, which certificate shall be in a form approved by the auditor general, and shall be the basis for distribution of moneys between the several tax assessing units. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments assessed or levied against said lands prior to the vesting of title in the state of Michigan."

and the East Clawson Storm Sewer Drain district fund has received its share of such proceeds.

CONCLUSION

Taking the best view of Appellant's case it sums up as follows:

1. Appellants had certain contractual rights by virtue of their ownership of bonds purchased in 1927. The then statutes were part of the contract, subject, of course, to "'the well known reservations of the essential attributes of the sovereign power and this reservation must also be read into contracts as a postulate of the legal order." (*Keefe v. Drain Commissioner*, 11 N. W. (2d), 220, page 223);

2. These rights consisted of, (1) a spread in case of deficiency, (2) a perpetual lien until the taxes were paid (Sec. 18, ch. 10, Act 316 of 1923).

3. Alarming tax delinquency ensued and Act 114 of 1937 was passed providing that failure to redeem at a fixed time from the ensuing tax sales vested the properties

in the State of Michigan, free and clear of all liens and encumbrances (*Baker v. State Land Office Board*, 294 Mich. 587).

4. In vain do you search the "Petition for Declaration of Rights" and Appellants' brief in the Michigan Supreme Court for specific mention or challenge to the constitutionality of Act 114 of 1937. The most you can find is mention of Act 155 of 1937 and "statutes construed *in pari materia*" or reference to the "general tax law." To attack the constitutionality of an act specific pleading is necessary. True, the reply brief attempts to gather Act 114 of 1937 into the fold, but still the "Statement of Questions Involved" presented to the Michigan Supreme Court did not pass on it other than to say, "The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision." (11 N. W. (2d), page 223.)

5. Also in 1937, Act 155 was passed to set up machinery for disposing of the many state owned properties at public auction and for disposition of the proceeds;

6. The State Land Office Board sold the properties under Act 155 of 1937, free and clear of encumbrances including drain liens because the State had received them free and clear under Act 114 of 1937;

7. Appellants now attack the constitutionality of Act 155 of 1937 when it did not deprive them of any rights but gave them their percentage of the proceeds of the sale of delinquent lands;

8. Appellants attempt to attack the constitutionality of Act 114 of 1937 when the question of its constitutionality was neither presented to nor passed on by the Michigan Supreme Court;

9. No question giving this court jurisdiction exists.

The motion to dismiss and/or the motion to affirm sho
be granted.

Respectfully submitted,

HARRY J. MERRITT,
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1 Lafayette Street,
Pontiac, Michigan,
Attorney for Appellees.

WILLIAM CLARENCE HUDSO
City Hall, Royal Oak, Michiga
Attorney for Intervened
Appellee.

Dated: December 30, 1943.

FILE COPY

Office - Supreme Court, U. S.
MAR 2 1944
CHARLES ELMORE CROPLEY

United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN—No. 42,415

BRIEF FOR APPELLEES ON MOTION TO DISMISS

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Royal Oak, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

QUESTIONS INVOLVED

I.

Was the constitutionality under Article I, Section 10 of the Federal Constitution challenged in the Michigan Supreme Court to a sufficient extent to give the United States Supreme Court jurisdiction to pass on the constitutionality thereof?

Appellants say "Yes."
Appellees say "No."

II.

Did Act 155 of the Public Acts of Michigan for 1937 deprive Appellants of any rights in violation of Article I, Section 10 of the Federal Constitution?

Appellants say "Yes."
Appellees say "No."

III.

Should the motion to dismiss Appellants' appeal be granted?

Appellants say "No."
Appellees say "Yes."

IV.

Should the motion to affirm the decision of the Michigan Supreme Court be granted?

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BRIEF FOR APPELLEES ON MOTION TO DISMISS

FACTS

(Applicable to Motion to Dismiss)

On June 25, 1942, Appellants filed in Oakland County Circuit Court, a petition for Declaration of Rights under section 13909 Michigan Compiled Laws for 1929.

The petition set up the fact that petitioners were the owners of 32 bonds issued by the East Clawson Storm

Sewer District, that they were due and unpaid, that they were entitled under the Michigan Drain law to a deficiency spread of assessment against all lands originally in the district including those sold by the State of Michigan under Act 155 of 1937 as amended.

Paragraph 5 of the Petition for Declaratory Judgment, which purports to raise a question under both the Federal and State constitutions reads as follows:

> "5. Petitioners are advised and believe that said questions must under the law of this State, interpreted to conform with various provisions of the Constitutions of the United States and the State of Michigan hereinafter set forth, be answered in the affirmative. Petitioners allege that Section 18, Ch. X, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927 and Act 129 Michigan Public Acts 1939, provided for *addition deficiency assessments after the bonds of said drain district had all matured, to be levied in accordance with the percentages fixed in the original assessment rolls against every parcel of land in the drain district,* except those which at the time of the additional levy are exempt by reason of an actual ownership by the State of Michigan, United States of America, or municipal corporations, (and used by them for governmental purposes,) and that nothing contained in Act 155 Michigan Public Acts of 1937, as amended, or any other statutes in *pari materia,* abrogated or curtailed such provision, or could as against petitioners or other holders of bonds of said district abrogate or curtail the same, and that any interpretation of same in the manner contended by respondents would violate Article 1, Section 10, and Amendment XIV, Section 1, of the Constitution of the United States, Article II, Sections 10 and 16, and Article X, Section 9, of the Constitution of the State of Michigan."

The Oakland Circuit Court denied petitioners the relief sought and appeal was taken to the Michigan Supreme Court.

Appellants filed briefs in the Michigan Supreme Court and set up the required "Statement of Questions Involved" as follows:

1. When lands in a drain district have passed through a scavenger sale under Act 155, Public Acts 1937, as amended, and are again privately owned, are they exempt from additional deficiency drain taxes provided under Act 129, Public Acts 1939?

The lower court said "Yes."
Appellants contend answer should be "No."

2. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article X, Section 9 of the State Constitution?

The lower court impliedly said "No."
Appellants contend answer should be "Yes."

3. If Act 155, Public Acts 1937, as amended, can be construed as making such lands exempt from deficiency assessments, does it violate Article I, Section 10, of the Federal Constitution, and Article II, Section 9, of the State Constitution?

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4. Do municipalities, against which an at large tax is spread, and lands which have not passed through a scavenger sale, become exempt from a deficiency levy under Act 129, Public Acts of 1939?

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Appellees accepted the issues as framed in the "Statement of Questions Involved" and filed brief pointed at those issues.

Appellants filed a reply brief and in an obvious, "casual" way referred to, "Acts 114 and 155 of 1937" but did not otherwise attack the constitutionality of Act 114 of 1937. The Michigan Supreme Court was not asked to, nor did it pass on, the question of Act 114 of 1937 impairing the obligation of contract provision of the Federal constitution, that question not being before them.

ARGUMENT AND LAW

Summary of Appellees' Position

A. The Act which removed the liens of Appellants was Act 114 of Public Acts of 1937, as amended.

B. Whether or not Act 114 of 1937, as amended, violated Article I, Section 10 of the Federal Constitution was not raised in the Michigan Supreme Court, was not passed on by that court and consequently this court is without jurisdiction.

C. No contract relation complained of was created by Act 155 of 1937 as amended, between the parties hereto or any other parties, hence a challenge here to the constitutionality of Act 155 of 1937, as amended, must fail.

A.

The Act which removed the liens of Appellants was Act 114 of 1937, as amended, by Act 282 of 1939 and Act 234 of 1941, the pertinent portion of which reads as follows:

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land should be redeemed as provided in section 74 of Act 206 of Public Acts of 1893, as amended, or unless an appeal shall have been taken as provided in said Act * * *."

If the constitutional rights of Appellants were violated by removal of the liens, which they claim (which Appellees deny) then Act 114 of 1937, as amended, as above quoted was the Act which violated their constitutional rights not Act 155 of 1937 as amended.

B.

"Whether or not Act 114 of 1937, as amended, violated Article I, Section 10 of the Federal Constitution was not raised in the Michigan Supreme Court, was not passed on by that court and consequently this court is without jurisdiction."

Reference to "Statement of Questions Involved" as framed by Appellants in their brief filed in the Michigan Supreme Court (Page (i) brief for Petitioner) will disclose that the constitutionality of Act 114 of 1937, as amended, was not challenged in the Michigan Supreme Court.

Reference to the decision of the Michigan Supreme Court in the instant case, 306 Mich. 503, 11 N. W. Reporter, second series, 220, will disclose that the Michigan Supreme Court did not pass on the constitutionality of Act 114 as being violative of Article I, Section 10 of the United States Constitution and presumably they did not do so because the question was not presented to them.

It is too late at this time to present the question of the constitutionality of Act 114 of 1937 as amended as this court has declared on many occasions,

"In order to give the Supreme Court jurisdiction of a writ of error to review a judgment which the highest court of a State has rendered in favor of the validity of a statute of, or an authority exercised under a State, the validity of a statute or authority must have been drawn in question on the ground of their being repugnant to the Constitution, laws or treaties of the United States. When no such ground has been presented to or considered by the courts of the State the federal Supreme Court has no jurisdiction." *Michigan Central Ry. Co. v. Michigan Southern Ry. Co.*, 19 How. 378, 15 L. Ed. 689; *Adams v. Preston*, 22 How. 473, 16 L. Ed. 273; *Levy v. San Francisco Superior Court*, 167 U. S. 175; *Millar v. Cornwall Ry. Co.*, 168 U. S. 131.

"The United States Supreme Court may not undertake to review decisions of State court, unless it appears affirmatively from the record not only that the federal question involved was presented for decision to the highest court for jurisdiction, but that its decision of the federal question was necessary to determination of the cause." *Honeyman v. Hanan*, 57 S. Ct. 350, 300 U. S. 14; 81 L. Ed. 476, *Southwestern Bell Telephone Co. v. State of Oklahoma*, 58 S. Ct. 528, 300 U. S. 206.

C.

No contract relation complained of was created by Act 155 of 1937 as amended, between the parties hereto or any other parties, hence a challenge here to the constitutionality of Act 155 of 1937, as amended, must fail.

The statutes in existence at the date the bonds were issued, namely, November 1, 1927, and which statutes Appellants claim are part of their bond contract, are known as Act 316 of the Public Acts of Michigan for 1923, as amended by Act 331 of the Public Acts of Michigan

for 1927 and further amended by Act 139 of Michigan Public Acts for 1939, and the pertinent section thereof is found in Michigan Statutes Annotated, 11.104.

Assuming for the sake of argument that the Appellants had contractual rights under Section 18 above referred to, those rights, if impaired (which is denied) were impaired by Act 114 of Public Acts of 1937, as amended, the constitutionality of which was not challenged in the Michigan Supreme Court and cannot be challenged here.

The only remaining question then, is whether or not any contractual rights of Appellants were violated by the passage of Act 155 of 1937, as amended, the constitutionality of which is challenged.

Assuming as we must that Act 114 of 1937, as amended, is constitutional, and it has been so adjudicated in *Baker v. State Land Office Board,* 294 Mich. 587, page 598, the title to the various properties which were not redeemed by the parties in interest including Appellants as parties in interest, passed to the State of Michigan free of all liens and encumbrances. Act 155 of 1937, as amended, set up the machinery to dispose of the State owned lands which at best was a change in the remedy afforded to collect delinquent taxes. Owning the lands free and clear there was nothing to prevent the State from selling them free and clear and certainly the Appellants acquired no contractual rights complained of here (see exception below) by virtue of the provisions of Act 155, and Act 155 did not take away any rights Appellants had, the loss, if any, of the rights complained of having taken place under Act 114 of 1937, as amended.

Hence, we have before the court a situation where Appellants are challenging the constitutionality of an Act, namely, Act 155 of 1937, as amended, as being violative

of Article I, Section 10 of the United States Constitution which prohibits the impairment of obligation of contract when no contractual rights complained of were created or destroyed by the Act. Appellants have no standing in court under *Municipal Investors v. City of Birmingham*, 216 U. S. 152-3.

The only contractual right acquired by Appellants under Act 155 of 1937 was the following (M.S.A. 7.960, Section 10):

> "All moneys received by the state land office board, any county treasurer or the department of convervation, under the provisions of this act, and all moneys received after the expiration of this act by the department of conservation pursuant to any sale by said state land office board on time payment plans, shall be credited to the general fund of the state, and, after first deducting such commissions and maintenance costs as are authorized in sections 4 and 8 of this act, shall be paid to the several county treasurers who shall remit the same to the several tax assessing units, including municipalities collecting their own delinquent taxes, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer or the department of conservation; Provided, however, That at the close of each fiscal year the state land office board shall deduct from interest received on land contracts during that year an amount equivalent to the operating expenses of the board for that year, which amount shall be credited to the general fund of the state (and the remainder after deducting the expense of the county treasurer in making distribution under this section shall be pro rated among the several tax assessing units aforesaid, in proportion to the delinquent taxes and special assessments of such units cancelled, as aforesaid).

> It shall be the duty of any county treasurer to prepare a certificate of all cancelled taxes upon any such description of land upon request by the state land office board, the department of conservation or the auditor general, which certificate shall be in a form approved by the auditor general and shall be the basis for distribution of moneys between the several tax assessing units. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments assessed or levied against said lands prior to the vesting of title in the state of Michigan."

and the East Clawson Storm Sewer Drain District fund has received its share of such proceeds.

CONCLUSION

Taking the best view of Appellants' case it sums up as follows:

1. Appellants had certain contractual rights by virtue of their ownership of bonds purchased in 1927. The then statutes were part of the contract, subject, of course, to "the well known reservations of the essential attributes of the sovereign power and this reservation must also be read into contracts as a postulate of the legal order." (*Keefe v. Drain Commissioner*, 11 N. W. (2d) 220, page 223).

2. These rights consisted of, (1) a spread in case of deficiency, (2) a perpetual lien until the taxes were paid (Sec. 18, ch. 10, Act 316 of 1923).

3. Alarming tax delinquency ensued and Act 114 of 1937 was passed providing that failure to redeem at a fixed time, from the ensuing tax sales, vested the properties in the State of Michigan, free and clear of all liens and

encumbrances (*Baker v. State Land Office Board*, 294 Mich. 587).

4. In vain do you search the "Petition for Declaration of Rights" and Appellants' brief in the Michigan Supreme Court for specific mention or challenge to the constitutionality of Act 114 of 1937. The most you can find is mention of Act 155 of 1937 and "statutes construed in *pari materia*" or reference to the "general tax law." To attack the constitutionality of an act specific pleading is necessary. True, the reply brief attempts to gather Act 114 of 1937 into the fold, but still the "Statement of Questions Involved" presented to the Michigan Supreme Court did not present it and the Court did not pass on it other than to say, "The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision." (11 N. W. (2d) page 223).

5. Also in 1937, Act 155 was passed to set up machinery for disposing of the many state owned properties at public auction and for disposition of the proceeds.

6. The State Land Office Board sold the properties under Act 155 of 1937, free and clear of encumbrances including drain liens because the State had received them free and clear under Act 114 of 1937.

7. Appellants now attack the constitutionality of Act 155 of 1937 when it did not deprive them of any rights but gave them their percentage of the proceeds of the sale of delinquent lands.

8. Appellants now attempt to attack the constitutionality of Act 114 of 1937 when the question of its constitutionality was neither presented to nor passed on by the Michigan Supreme Court.

9. No question giving this Court jurisdiction exists.

The motion to dismiss and or the motion to affirm should be granted.

Respectfully submitted,

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Dated: December 30, 1943.

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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

BRIEF FOR APPELLEES

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BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

BRIEF FOR APPELLEES

SUMMARY OF APPELLEE'S POSITION

1. Under the provisions of the Michigan general tax law as it existed when appellants purchased their bonds, lands to which the State had acquired absolute title through tax delinquency, when sold by the State, were sold with all liens cancelled. (*Auditor General v. Clifford*, 143 Mich. 626, p. 630.)

2. After the passage of Acts 114 and 155 of 1937, the same situation existed, the only difference being that the date the State would acquire absolute title was accelerated

and appellants admit such acceleration does not violate the Federal Constitution (p. 26 Brief for Appellants).

3. Appellants were deprived of nothing, hence their claim of impairment contemplated by Art. I, Sec. 10, U. S. Constitution is without foundation.

FACTUAL AND LEGAL BACKGROUND

1. On the 1st day of November 1927, the East Clawson Storm Sewer Drain District issued bonds to pay for the construction of a drain to service the district (R. 7-8).

2. The law of Michigan was part of such contract as was made. *Home Building & Loan Assoc. v. Blaisdell,* 290 U. S. 398, 88 A. L. R. 1481; *Keefe v. Oakland County,* 306 Mich. 512.

3. Three pertinent provisions of the drain law, Act 316 of 1923 and Act 129 of 1939 an amendment to section 18, are involved, section 5 (M. S. A. 11.91), section 15 (M. S. A. 11.101), and section 18 (M. S. A. 11.104).

Section 5 reads as follows:

> "All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. Drain taxes, when collected shall be returned to the county treasurer to be disbursed by him. In all cases where suit is brought against the collector arising out of the collection of any drain tax, the county shall defend such officer in the same manner that he has now the right to be defended in the collection of general taxes. No suit shall be instituted to recover any drain tax or

money paid or property sold therefore, or for damages on account thereof, unless brought within thirty days from the time of payment of such money to, or sale of such property by, the collecting officer; and if such tax shall be paid under protest the reason therefor shall be specified, and the same procedure observed as is or may be required by the general tax law. All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid."

Section 15 reads as follows:

"In cases where the issuing of bonds shall have been determined upon, as hereinbefore provided, and subject to the provisions of section one (1) of chapter eight (8), the commissioner may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage district as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of or in taxes to be thereafter collected, *and the amount thereof shall not exceed the aggregate of the installments levied.* Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installments of taxes, shall mature not earlier than March first (1st) nor later than June first (1st) of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed twenty (20): * * * *The Commissioner shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that*

they are taxed for the benefits received thereby. • • • PROVIDED, HOWEVER, That this amendatory act shall not be considered to affect any bonds or refunding bonds issued prior to the effective date hereof and subsequent to the effective date of act number three hundred thirty-one (331), public acts of nineteen hundred twenty-seven (1927), or any refunding bonds hereafter issued to replace the same.

PROVIDED FURTHER, That no county shall advance or pay out of its general funds any moneys for or on account of principal or interest of any drain bonds issued prior to the effective date of act number three hundred thirty-one (331) of the public acts of nineteen hundred twenty-seven (1927), or any refunding bonds issued to replace the same." (emphasis supplied.)

Section 18 reads as follows:

"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, whether such insufficiency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasurer and be used for the maintenance of the drain."

Act 129 of 1939 amended Section 18, by inserting the following language:

Chapter X, Section 18, • • • "and in case bonds or other evidences of indebtedness are issued pursuant to act number 13 of the public acts of 1932,

first extra session, and acts amendatory thereto, to refund the outstanding indebtedness of a drain district, the governing body of such drain district shall provide, subject to the directions of the public debt commission, for such additional levies of assessments prior to the maturity of such refunding obligations as it shall deem necessary to prevent default in payment of interest on such obligations, and the maintenance of a sinking fund for their retirement, and it shall be the duty of every officer charged with the determination of the amount of taxes to be raised, or the levying of such taxes, to make or to cause to be made the additional levies as provided." • • •

The Michigan Supreme Court in the case of *Municipal Investors Association v. City of Birmingham*, 298 Mich. 314, held that lands the title to which has passed through the State were free from pre-existing liens and that deferred installments of special assessments were liens and hence removed.

Appellants, not parties to that action, instituted this suit under the Michigan declaratory judgment law to attack the *Municipal Investors v. Birmingham* decision and challenge Act 155 of 1937 as being violative of Art. I, Sec. 10, Federal Constitution. For the purpose of this brief we will assume that Act 114 of 1937 was also challenged as to constitutionality. (See Motion to Dismiss.)

QUESTION OF LAW INVOLVED

Did Acts 114 and 155 of the Michigan Public Acts of 1937 or either of them deprive Appellants of any rights in violation of Art. I, Sec. 10, U. S. Constitution?

Appellees say, No.
Appellants say, Yes.

DEPRESSION AND REMEDIAL STEPS BY LEGISLATURE

In the late twenties and early thirties the nation was in an economic depression of alarming proportions, Michigan was severely hit, unemployment was rife, welfare was at a peak, tax delinquencies were universal, mortgage and contract foreclosures were depriving thousands of their homes, there was food rioting.

When the 1933 Michigan legislature convened, drastic steps were taken to meet the existing emergency.

The annual tax sale was stopped, in Act No. 2, P. A. 1933, an emergency was declared under the police power and a moratorium granted on mortgage foreclosures in Act No. 98, P. A. 1933. An emergency was declared and a moratorium granted on land contracts in Act No. 122, P. A. 1933, Chancery Courts were given power to fix a minimum sale price for real estate where deficiency decrees were involved in Act No. 229, P. A. 1933, an emergency was declared and the governor was authorized to declare a bank holiday in Act No. 47, P. A. 1933, an emergency was declared and 1932 and prior taxes were permitted to be paid over a ten year period, Act No. 126, P. A. 1933. Acts 63 and 267, P. A. 1933 cancelled penalties, fees and interest. The failure of the real property tax induced the passage of the Sales Tax, Act 167, P. A. 1933.

The year 1935 saw the legislature still fighting the emergency, Acts No. 3, 4, 18, 57, P. A. 1935.

In 1937 the fight was still on, Acts No. 1, 2, 28 and then the rehabilitation started to take place. Act No. 325 of 1937 set a tax sale for the first Tuesday in May 1938. Act No. 114 of 1937 set up the form of decree for the sale under Act 325 and contained this provision,

"It is further ordered, adjudged and decreed that title to each parcel or land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and encumbrances, of whatever kind or nature * * *."

Act 153 of 1937 established the State Land Office Board prescribed its duties and established the machinery for disposing of the lands unredeemed, and the title to which had passed to the state. Act 325 of 1937 amended the general tax law, Section 74 and gave eighteen months to redeem from the 1938 sale.

The expiration of the period of redemption found the State owning nearly half the area thereof and upwards of 580,000 parcels below Bay City, including 65% of the drain district involved (Ex. 2—R. 56 A).

The historical background related above, was generalized by the Michigan Supreme Court in *Baker v. State Land Office Board*, 294 Mich. 587, pp. 592-3.

APPELLANT'S CLAIM

Petitioners now claim that Acts 114 and 155 of 1937 originally and as amended violate Article I, Sec. 10 of the United States Constitution. (They have abandoned other arguments of unconstitutionality in their brief.)

APPELLANT'S RIGHTS UNDER ACT 155

Let us examine the provisions of Act 155 of 1937 and, aside from the machinery for disposal of state lands, see what rights appellants had thereunder. Sec. 10 of the Act (M. S. A. 7.960) provides:

"All moneys received by the State Land Office Board, any County Treasurer or the Department of Conservation, under the provisions of this act, and all moneys received after the expiration of this act by the Department of Conservation pursuant to any sale by said State Land Office Board on time payment plans, shall be credited to the general fund of the State, and, after first deducting such commissions and maintenance costs as are authorized in sections 4 and 8 of this act shall be paid to the several County Treasurers who shall remit the same to the several tax assessing units, including municipalities collecting thereon delinquent and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any County Treasurer or the Department of Conservation * * * such cancelled taxes and special assessments assessed or levied against said lands prior to the vesting of title in the State of Michigan." M.S.A. 7.960.

The East Clawson Storm Sewer Drain District received its share of the proceeds of the sale of all lands in the drain district and consequently, any contractual rights appellants had under Act 155, they have received the benefit of, and of course, cannot not be heard to complain that their contract is violated or impaired by operation of Act 155. It should be here noted that appellants, in the Oakland County Circuit Court and the Michigan Supreme Court, complain that Act 155 of 1937 violated Article I, Section 10, of the Federal constitution and here make the same complaint in spite of the fact that they received the full benefit of the provisions of Act 155.

APPELLANT'S RIGHTS UNDER ACT 114

Act 114 of 1937 which amended the decree of sale provided in the General Tax Law, reads as follows:

> "It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes, special assessments, which are charged against or are liens upon such parcels, and other liens and encumbrances, against such parcels of whatever kind or nature, shall be cancelled as of such date * * *."

Act 114 of 1937 is the act which reverted the delinquent lands to the State with the encumbrances specifically removed and if either act can be complained of it must be Act 114 rather than Act 155 of 1937.

CONTINGENCIES AFFECTING BONDHOLDERS

It is the position of Appellees:

1. That at the time Appellants purchased their bonds, several contingencies existed, the development of any one of which would prevent bondholders from recovering 100 cents on the dollar on their investment, namely,

   A. Reversion to the state of a portion of the district;

   B. Intervention of Eminent Domain;

   C. Limitation on taxing power by rule that assessments cannot exceed benefits resulting;

2. That one of those contingencies did develop, namely *abnormal* tax delinquency.

3. That, fundamentally, the passage of Acts 114 and 155 of 1937 did not change the contract relation with bondholders in any respect.

4. That there is no impairment of contract as contemplated by Art. I, Sec. 10, United States Constitution.

5. That instead of depriving appellants of any contractual rights, Act 114 saved appellants from a possible greater total loss and salvaged something out of a bad investment, rather than deprived appellants of any rights.

6. That the Motion to Affirm should be granted or the decision of the Michigan court upheld.

LAW AND ARGUMENT

As is pointed out in a previous portion of this brief, section 18, of the drain law provides for one additional spread of tax in case of a deficiency in the drain fund. Section 5 of the act provided that the lien appellants had to secure the indebtedness represented by their bonds be foreclosed by sale of the lands under the provisions of the general tax law.

To place the further burden of a deficiency assessment on the lands which were already valueless through an existing tax burden and were on a wholesale basis being returned to the state, would have procured nothing for appellants. As was said by the Supreme Court of the United States in *Municipal Investors v. City of Birmingham*, 216 U. S. 152,

> "If the stated powers of the village to levy an assessment on improvement district property required that the lots assessed, after sale for default in their installments, should be subject to an additional assessment to cover such deficiencies, the burden might depress their values to a point where little if anything could be realized for the bondholders, and successful sale for non-payment would be frustrated. This would clearly be true, where as here, a very large proportion of the assessment were defaulted."
>
> "To this we (Michigan Supreme Court) add the obversation that, if the lands were again subject to a deficiency assessment, after sale to the State and conveyance by it to a third party, the possibility of the restoration of this property to the tax rolls would be considerably lessened because prospective buyers might well hesitate to assume such an obligation."

The right to an additional deficiency assessment must be subordinated to the provision of Sec. 5 of the drain law, providing for foreclosure of the existing lien for taxes in pursuance of the provisions of the general tax law. No choice existed, if the lands were delinquent, they were sold the third year thereafter and if there were no purchasers, reverted to the state. After five years the title in the state became absolute and the lands could be sold free from liens. (*Audior General v. Clifford*, 143 Mich. 626, p. 630).

Act 114 of 1937 amended the general tax law which could not be construed as a violation of the contract rights of appellants because appellants had specifically contracted to have their lands sold, in compliance with the provisions of the general tax law. M. S. A. 11.91. In other words, appellants by contract had the right to have the lands subjected to the lien of drain taxes, sold in pursuance of the general tax law in the event of failure of the property owners to pay the taxes. The lands were so sold and appellants have received their share of the proceeds and they should not now be heard to complain of a violation of their contract rights having received the benefits of their "maximum security." *Keefe v. Oakland County*, 306 Mich. 503, p. 511 (R. 44).

LIEN OF DRAIN TAXES

Appellees do not dispute the fact that the drain taxes assessed upon the several parcels were a lien upon the several parcels under the Michigan drain law.

The machinery provided by law for the foreclosure of such liens was the general tax law of Michigan and appellants had no right to foreclosure in any other manner. Complete foreclosure was had. Sale at the tax sale in

1938 and subsequent years, followed by a failure to redeem at a specific time, vested title to the lands in the state, free and clear of encumbrances under Act 114 of 1937 (R. 43). Redemption is not a matter of right, but privilege which can be taken away by the legislature. *Keeley v. Sanders,* 99 U. S. 441, *Dumphey v. Hilton,* 121 Mich. 315. Subsequent sale under Act 155 of 1937 supplied appellants with their share of the proceeds of the sale and foreclosure of the lien. It is difficult indeed to see how their contract has been impaired when they have had the maximum benefit of the contract. The results obtainable from the most drastic remedy provided was complete foreclosure and sale of the security covered by their lien.

HYPOTHETICAL CASE

Suppose for instance there were no at large assessments on any municipalities in the drain district. That all of the assessments were on individual parcels of property. Let us further suppose that every parcel in the district became delinquent, reverted to the state under the provision of Act 114 of 1937, and all were sold by the state under provisions of Act 155 of 1937, and the proceeds distributed to the taxing units including this drain district. Here would be a case where the lien on the security pledged would have been foreclosed and the maximum obtainable from the liquidation procured. Can appellants point out any sound legal theory showing a right to again assess the lands in the drain district? We think not.

The Michigan Supreme Court in this case held that in the proportion that the lien was foreclosed it no longer exists that the lien the appellants had still exists on the property which did not revert to the state. Appellants still have, in regard to that property, everything they had

before the passage of Acts 114 and 155 of 1937 and have been deprived of nothing in that respect.

It should be noted here that the effect of the Michigan court's decision in this case is to interpret its own statutes namely, the drain law, to mean that no parcel of land in a drain district is insuror of payment of the full indebtedness of the district. In other words, at no time did any parcel of land in a drain district, or any municipality assessed at large therein, become responsible for more than its share of the indebtedness of the district or its percentage of any deficiency, and the Supreme Court of the United States should have no quarrel with this interpretation under the holding in *Erie Railroad v. Tompkins*, 305 U. S. 64, 82 Lawyers Edition 787.

CHALLENGE TO APPELLANTS

Appellees challenge appellants to find any language in the provisions of their contracts which gives them the right to liquidate in pursuance of their contracts, 65% of their security by foreclosure and then turn around and force the remaining 35% of the original drain district to pay the loss sustained by appellants, through liquidation of their security for less than the obligations to which it was originally committed. Default on one parcel resulted in no increase in benefit to another parcel and benefit is the yardstick by which the right to assess is measured. (M. S. A. 11.57.)

To make 35% of an original drain district bear 100% of the liability of that district would clearly be to deprive the 35% of their property without due process of law, because the Michigan drain law never permitted or contemplated such procedure. *Keefe v. Drain Commissioner*, 306 Mich. 503, p. 513.

Appellees further challenge appellants to point out any provision of the drain law which makes one of the several parcels in a drain district insuror for the performance of another parcel. If such were the law it is entirely conceivable that a portion of a drain district could go on paying forever with the debt constantly growing larger because deficiency assessments under the drain law must be made in pursuance of section 18, M. S. A. 11.104 "as hereinbefore provided" which refers back to section 3, of chapter 9, M. S. A. 11.101, which reads as follows:

> "Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same and to pay all the costs and incidental expenses or to pay the principal and interest on bonds if such are issued, a further assessment shall be made to meet the deficit or additional expense. *Such further assessment shall be apportioned, assessed, levied and collected as provided in the first instance, and on the same percentage, and shall be collected in one year,* but there shall be no review of nor appeal from such further assessment: * * *" (emphasis supplied.)

CONTRACT

That, "The law of the land," was a part of such contract as the petitioner-bondholders had, is undisputed (appellant's brief p. 11). Let us analyze their contract and ascertain if possible in what manner acts 114 and 155 of 1937 have deprived them of anything rising to the dignity of impairment as contemplated in the provisions of Art. I, Sec. 10 of the United States Constitution.

ACT 155 P. A. 1937

At the outset Act 155 of 1937 deprived them of nothing. It set up the machinery for the disposal of state owned lands and provided that (Sec. 10),

> "All moneys received by the state land office board, any county treasurer or the department of conservation, under the provisions of this act and all moneys received after the expiration of this act by the department of conservation pursuant to any sale by said state land office board on time payment plans shall be credited to the general fund of the state, and shall be accounted for with the several tax assessing units, including municipalities collecting their own delinquent taxes, as provided in the general tax law, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land on account of which revenue is received by the board as provided in this act."

The appellants have received the moneys due them under the act, had the benefit of all provisions operating in their favor, so it seems there could be no useful purpose served in further pursuing Act 155 of 1937.

ACT 114 OF 1937

Act 114 of 1937 encompasses such issues as are here involved and if appellants claim of unconstitutionality can be substantiated in any particular it must be directed against Act 114.

What Were Appellant's Contract Rights?

These elements enter into it:

I. The provisions of the bond (R. 7-3).

II. The provisions of the drain law, principally sections 5 and 18 and 15 and the portions of the general tax law covering the foreclosure of tax liens.

III. Pertinent provisions of the constitution.

IV. The police power of the State of Michigan.

We consider them in the order named above.

I.

"The Provisions of the Bond"

Inasmuch as the provisions of the bond must be restricted by the statutory authority of the Drain Commissioner to execute the same, we pass immediately to the second heading to lend particular attention to Sec. 15 of the drain law.

II.

"The Provisions of the Drain Law, Principally Sections 5, 18 and 15, and the General Tax Law"

The pertinent portion of Sec. 15, Chapter X of the drain law, Act 316 of 1923 as amended by Act No. 331 of 1927, M. S. A. 11.101, effective on the date of issue of Appellant's bonds, read as follows,

> "In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than one installment, said commissioner by and with the written approval of the judge of probate and the county treasurer of the county, may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage districts as hereinbefore defined. Such obligations

shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installments of taxes, shall mature not earlier than March first nor later than June first of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed fifteen and the amount of each installment shall be fixed by the commissioner to correspond as near as may be to his estimate of the amount of taxes actually collectible each year. *The commissioner shall prescribe the form of the bond by and with the written approval of the judge of probate and the county treasurer of the county and shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby:* Provided, That the written consent as above set forth of any judge of probate or county treasurer shall not be required in proceedings relating to inter-county drains. Such bonds shall be advertised and sold by the drain commissioner after the manner provided for the advertisement and sale of municipal bonds by act number two hundred seventy-three of the laws of nineteen hundred twenty-five and any amendments which may be made thereto governing such advertisement and sale. If any premium is received thereon such premium shall belong to the fund of the drain. The proceeds derived from the sale of such bonds shall be deposited with the county treasurer to the credit of the drain fund. The county treasurer shall safely keep all such bonds until sold as above provided."

The following portion of the section quoted above must be weighed carefully, "The commissioner shall prescribe the form of bond by and with the written approval of the judge of probate and the county treasurer of the county and shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, IN THE PROPORTION THAT THEY ARE TAXED FOR THE BENEFITS RECEIVED THEREBY."

The drain commissioner could never pledge more than authorized by the foregoing language, *Lawrence v. American Security Co.*, 263 Mich. 586, which in this case sums up as follows:

District	77.5% of indebtedness
Oakland County	3.5% of indebtedness
Township of Troy	2.5% of indebtedness
Township of Royal Oak	6.5% of indebtedness
Village (now city) of Clawson	10.0% of indebtedness

No one of these units was ever liable for more than the percentage stated above, *either of original cost (M. S. A. 11.104)* or deficiency (M. S. A. 11.181).

The drain commissioner never possessed authority to pledge more. He never had authority to pledge the full faith and credit of any unit (M. S. A. 11.101). *Keefe v. Bloomfield Drain District*, 119 Fed. (2), p. 157.

The bond is strictly a special assessment bond and IS NOT A GENERAL OBLIGATION BOND. *Moore v. Nampa*, 276 U. S. 536; *Divide Creek Irrigation District v. Hollingsworth*, 96 A. L. R. 937, 43 A. J. 495, Sec. 282.

The Michigan Supreme Court treated the bond as a special contrasted with a general obligation bond and their opinion in this case is predicated on that theory. Their

interpretation of Michigan statutes is binding on this court (*Erie Railroad v. Tompkins,* 304 U. S. 64, 82 Lawyers Edition 78, and *Keefe v. Royal Oak,* 87 Fed. (2) 786).

All that appellants ever had a right to, by way of reassessment, was the portion of any deficiency which the original percentage allocated to the unit, bore to the total deficiency (M. S. A. 11.104, 11.101).

Let us go one step further. When a Michigan drain roll is made, each unit whether a single lot, a piece of acreage, a trunk line highway or a municipality is allocated its percentage of total cost.

The district in this case, for instance, was not allocated 77.5% of the cost, but the aggregate of percentages allocated to individual parcels totalled 77.5% of the entire cost. Thus, the liability of each parcel for original cost and deficiency was fixed at the inception of the roll and no parcel or unit at large guaranteed payment by any other parcel or unit.

When the provisions of the general tax law (Act 114 and Act 155 of 1937) became operative, and such provisions were a part of the CONTRACT (M. S. A. 11.91) the lien was foreclosed and some of the source of revenue of the district liquidated. In effect part of the originally obligated parcels went through bankruptcy. Part still remains and the liability of that part for existing deficiency is limited to the percentage originally allocated to that part.

When the Michigan Supreme Court made the following statement in *Baker v. State Land Office Board,* 294 Mich. 587, p. 599,

> "It is claimed that the statute destroys vested rights of municipalities to tax liens and assessments already assessed and levied, and destroys property

> and contract rights of individuals who have purchased bonds under the assumption of their payment through collection of the very taxes and assessments which the act cancels. *'In addition to our determination as above expressed, it can be said that such purchasers can be assumed to have purchased with knowledge that the lien upon the property securing such taxes and assessments might be displaced.''* (Emphasis supplied.)

it interpreted the drain law of Michigan, and that interpretation is especially significant here because it goes to the very base of such contractual rights as exist in this case.

Both in the Michigan Supreme Court and here, appellants claim that appellees, "are obliged by Act 129 P. A. of 1939, to levy an additional assessment upon all taxable property in East Clawson Storm Sewer Drain District to provide for payment of the outstanding bonds and interest thereon."

Act 129 of 1939, passed twelve years after these bonds were issued, could have been repealed without depriving appellants of any original rights. (*Baker v. State Land Office Board,* 294 Mich. 587, p. 601). It conferred rights non-existent at the time the bonds were issued, by authorizing deficiency spreads before all of the bond issue was due, whereas the drain law at the time the bonds were issued provided for one deficiency spread only in case the original cost was underestimated or after all bonds had become due. ANY DEFICIENCY SPREAD HAD TO BE IN THE ORIGINAL PERCENTAGES, (M. S. A. 11.101) and there could be only *one* deficiency spread. The new provisions of Act 129 of 1939 only affected *refunded* bonds. *The bonds here have not been refunded and Act 129 has no application different than the original act.*

The decision of the Michigan Supreme Court in this case authorized a spread on all the unreverted taxable lands in the district and the municipalities at large IN PROPORTION TO THEIR ORIGINAL LIABILITY and this was all appellants ever had a right to. Constitutionally, this gave them their due. They have been deprived of nothing. (*Keefe v. Oakland County*, 306 Mich. 503, p. 512.)

The purchasers of a Michigan drain bond *never*, under the Michigan law, had the right to expect 100% payment of principal and interest if part of the lands in the district reverted to the state. For instance, let us take a drain estimated to cost $1000.00, the cost to be spread on two municipalities at large and 100 parcels (the district), as follows:

County at large..... 10%
Township at large..... 20%
District ..... 70% Which 70% would be broken down on the 100 parcels composing the district or, assuming the benefits to be equal, each parcel would be a .7% of the cost.

Now suppose the bonds ran for fifteen years and a deficiency of $100.00 existed when the last bonds matured. Let us further suppose that 50 of the 100 parcels in the district had reverted to the state through failure of anyone to purchase the tax titles thereon, which situation could have existed when appellants bought their bonds or fifteen years thereafter. The 50 parcels owned by the state could not be assessed for any deficiency. The other units, namely, the county, townships and district (now 50 parcels) could only be assessed for deficiency in proportion to the original assessment or,

County	10%	of	$100.00	or $10.00
Township	20%	of	100.00	or 20.00
District	35%	of	100.00	or 35.00
Total	65%			65.00

Wherefore, because only one deficiency spread could be made the bondholders, of necessity, must bear the loss of $35.00 *which hazard existed when they purchased their bonds.*

The case before this court is that identical proposition, multiplied because of the abnormal tax delinquency which resulted from the depression. Analysis of the Michigan drain law discloses that this summary may be made:

WHEN APPELLANTS PURCHASED THEIR BONDS:

1. They knew (or were charged with notice) that some of their liens might be displaced by reversion of the land subject to the lien, to the State.

2. That the reverted lands could not be taxed.

3. That a deficiency might result.

4. That only one spread could be made to pick up the deficiency and that, after the bonds were all matured.

5. That no parcel or unit assessed at large was liable for more than its percentage of the deficiency and that was restricted to the exact percentage of the original cost.

6. That a deficit would still exist after the deficiency spread was made.

7. That there was no authority under the drain law to spread again to recover the remaining deficit.

8. That the loss must be borne by the holders of the bonds.

The potentiality of loss was a hazard taken by purchaser of every Michigan Drain Bond. Purchasers of Michigan drain bonds were obliged to weigh the possibility of loss in contemplating investment in drain bonds and assume the risk incident thereto. That they did so is attested by the fact that they made studies of the terriory, its probable development, adjacency to industry, desirability for home sites, etc. as reference to sales *prospecti* will show.

If Act 114 and 155 of 1937 had never been passed, appellants could and would probably have been in the same position they occupy today. How then can it be said that their rights are impaired? (M. S. A. 7.117 and *Auditor General v. Clifford,* 143 Mich. 626, p. 630.)

Eminent Domain

The exercise of the right of Eminent Domain by a municipality coupled with small scale tax delinquency could have brought about the same result and appellants purchased their bonds knowing that the right of Eminent Domain was not surrendered. For instance, suppose this situation existed:

A drain district is established as before.

County at large.....	10%
Township at large.....	20%
District (aggregate)	70%

Suppose, by Eminent Domain, ½ of the District (35%) is condemned for public purpose. The condemning public body pays in full the drain taxes including deferred installments. A portion of the remaining district defaults, the bonds all matured and there is a deficiency of $100.00.

The public lands cannot be assessed and the ratio of deficiency spread on the remainder must be the same as the original assessment. Then we would have the deficiency spread as follows:

County at large.....	10%	$10.00
Township at large.....	20%	20.00
District	35%	35.00
Total	65%	65.00

Loss to bondholders $35.00. This potential existed when appellants bought their bonds.

Special Assessment Taxes Equal to Benefit

Under Michigan law the justification for special assessments is resulting benefit and no land can be assessed for special improvements in excess of the resulting benefit.

The measure of benefit is fixed and delinquency of one or more parcels in a district does not increase the benefit to others.

> "The theory sustaining levies for sewer improvements is that the party assessed is locally and pecuniarily benefited over and above the ordinary benefits which as one of the community he receives in all public improvements to the precise extent of the assessment." *Kuick v. City of Grand Rapids,* 200 Mich. 582; *Dix-Ferndale Tax Payers Association v. City of Detroit,* 258 Mich. 390. See *Limitation of Taxing Power and Public Indebtedness,* sec. 1992, by *James M. Gray.*

The limitation of, "assessment," never being permitted to exceed, "benefit," (*Gast Realty Investment Co. v. Schneider Granite Co.,* 240 U. S. 55, cited with approval *Keefe v. Oakland County Drain Commissioner,* 306 Mich.

503, p. 514) placed another ceiling on recovery of investment. If the original assessments equaled the benefits, which presumably they did, no bondholder ever had the right to expect, in case of reversion to the state of a portion of the district, or intervention of Eminent Domain, one hundred cents on the dollar on his investment, because the delinquency of one parcel could not be shouldered onto any other. Never were the taxpaying portions of a drain district liable for more than their percentage of deficiency as a matter of contract created by the statute.

These three potentialities existed which could result in severe loss to holders of drain bonds.

1. Abnormal tax delinquency (here involved).
2. Normal tax delinquency plus intervention of Eminent Domain.
3. Possibility of assessments exceeding benefits, and these potentialities existed when the bonds were purchased and the purchasers assumed that hazard when they purchased the bonds.

One of those potentialities developed but not because of Acts 114 or 155 of 1937. It had existed before. Therefore, the consequence is that Act 114 and 155 did not in any way affect appellant's rights, or impair their contract obligations.

III.

Pertinent Provisions of the Constitution

A. Michigan Constitution.

Art. X, Sec. 9:

> "The power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any municipal corporation shall be a party."

Art. II, Sec. 9:

> "No bill of attainder, *ex post facto* law or law impairing the obligation of contract shall be passed."

The Michigan Supreme Court has upheld the constitutionality of both Acts 114 and 155 of 1937 in all particulars, *Baker v. State Land Office Board,* 294 Mich. 587; *Welch v. State Land Office Board,* 295 Mich. 85; *Municipal Investors Association v. Birmingham,* 298 Mich. 314; *Keefe v. Oakland County,* 306 Mich. 503.

B. Federal Constitution.

Art. I, Sec. 10:

> "No State shall enter into any treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the obligation of Contracts, or grant any Title of Nobility."

Inasmuch as the entire theme of this brief is directed to proving the absence of violation of any provision of Art. I, Sec. 10, United States Constitution, we make no specific argument here.

IV.

The Police Power of the State of Michigan

That the police power of the state was brought into play is evident from the following:

1. The declarations in the emergency acts referred to *supra* (pages 6 and 28 this brief) such as Act 98 P. A. 1933,

> "An emergency affecting the general credit situation in the State of Michigan, which requires special and temporary legislation under the police powers of the State, is hereby declared to exist."

2. Act 122 P. A. 1933:

> "This act is enacted to meet an emergency through the police power of the state and the legislature hereby declares such an emergency to exist, and further declares that this act is immediately necessary for the preservation of the public peace, health and safety and to promote and preserve home ownership."

3. *Keefe v. Oakland County Drain Commissioner,* 306 Mich. 502, p. 512:

> "The rule that existing laws are read into contracts, in order to establish the obligations by the parties, is subject, however, to the well known reservation of the essential attributes of the sovereign, and this reservation must also be read into contracts as a postulate of the legal order."

4. As stated by the Chief Justice in *Home Building & Loan Association v. Blaisdell,* 292 U. S. 398, p. 437; 8 A. L. R. 1481:

"The economic interests of the State may justify the exercise of its continued and dominant protective power notwithstanding interference with contracts."

5. *Long Is. Water Supply Co. v. Brooklyn*, 166 U. S. 685:

"But into all contracts * * * there enter conditions which arise, not out of the literal terms of the contract itself. They are super-induced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong * * *. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount wherever a necessity for their execution shall occur."

We respectfully submit that appellants have been deprived of no constitutional rights through the operation of Acts 114 and 155 of 1937 and the Motion to Affirm should be granted.

REPLY TO APPELLANT'S BRIEF

General Jurisdiction

Appellees do not challenge the general jurisdiction of this court nor the finality of the decision by the highest court in Michigan. They do challenge the jurisdiction of this court to pass on the constitutionality of Act 114 of 1937 but refrain from further argument here, relying on their Motion to Dismiss for protection thereon.

Appellees do deplore the classification of this case as, "the classic case of impairment of obligations of a municipal contract by withdrawing taxing power" (p. 3 Brief

for Appellants) and brand this statement by appellants as an attempt to obscure the real issue by drawing the proverbial herring across the trail.

It is refreshing to have appellants admit (p. 5 Brief for Appellants) "The trial court's opinion makes no mention of Act 114 Michigan Public Act 1937" but of course they could not be expected to admit that they did not request the court to pass on the act. The truth becomes apparent when counsel further says, "appellants appealed from the judgment claiming that the trial court erred in denying the petition, and in his rulings that land which had been sold under Act 155 of Michigan Public Acts 1937, were exempt from an additional deficiency assessment. Appellee's Motion to Dismiss is pointed directly at this fact plus the fact that the Michigan Supreme Court:

1. Did not pass on Act 114 of 1937 and;
2. It was unnecessary to do so to dispose of the case on the challenge to Act 155 of 1937.

It seems presumptuous of appellants (p. 6, Brief for Appellants) to say in reference to the Michigan Supreme Court, "It disposes of appellant's argument on the proposition that the obligation of contracts has been impaired by saying that such impairment is justified by necessity" (R. 45). Such language does not appear in the opinion let alone (R. 45). The Michigan Court never stated that appellant's contract was impaired but consistently has denied such argument, "The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision" (R. 44).

Let us consider appellant's "Argument" (p. 9 Brief for Appellants) under point (1). They make this confession, "Appellants have never contended that land whose title

has absolutely vested in the state is subject to a tax while the state owns it."

What could be more significant? If they admit this, having asserted the law that only *one* deficiency assessment can be made and that in ratio to the original assessment (p. 12 Brief for Appellants) *how can they deny that they bought the bonds assuming the potential of loss through tax delinquency, Eminent Domain or the ceiling of benefit equal to assessment or a combination thereof?* We say to appellants, "You admit state lands cannot be taxed yet you claim the right to tax them when they are back in private hands." Suppose the State held them for 100 years, can your 4th or 5th generation pop up some day, greet the stranger in possession and say, "You owe me some money on the East Clawson Storm Sewer Drain?" We think not.

There is nothing in the opinion of the Michigan Supreme Court in this case which is not consistent with the fact that no ruling was made on Act 114 and no finding made that the bondholders contract was impaired. The Michigan Court could have said, "We do not pass on Act 114, you have raised no question concerning it, we have passed on Act 155, but it deprives you of nothing and if we were to pass on Act 114 we would have to view it in the light of an exercise of the police power, give it liberal construction and hold your rights to be secondary to those of the public." The interpretation by appellants is wishful thinking.

Appellants, after saying (p. 10 Brief for Appellants) "Appellant's petition asked that the laws existing when their bonds were issued be enforced," say "Appellees contended that such laws had been changed, so that appellants no longer had the right which they sought to have en-

forced." We challenge this court's attention to our answer (R. 24-25-26-27) which is bare of any such claim. We do claim that Acts 114 and 155 of 1937 took nothing from appellants, saved them something and their loss would have been greater if Acts 114 and 155 of 1937 had not been passed and *they bought their bonds knowing they might lose on them.*

Point (2) Appellants' Argument

Appellees concur that the statutes became a part of the bond contract (p. 11 Brief for Appellants), in fact if appellants had not so urged, the point would have been pressed by appellees. The summary of the drain law procedure is substantially as carried out on page 12 Brief for Appellants but where they say, "the full faith and credit of the district," their enthusiasm passes the bounds of the statute. The words "full faith" do not appear in the statute as reference to section 18 of the drain law (M. S. A. 11.101, pp. 3-4 this brief) will show. The drain commissioner is authorized to pledge "the credit of the district • • •, cities, villages, townships, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby." No more, no less.

It is interesting to observe that appellants are willing to accept a "deficiency levy • • •" the bonds being all due (p. 13 Brief for Appellants) and "periodic deficiency levies" (p. 13 Brief for Appellants) if a refunding is effected to bring Act 129 of 1939 into play. This confirms appellee's interpretation of Act 129 of 1939. BUT it also proves that the bondholders faced a loss through reversion of lands when they bought their bonds. The most they

could recover was a percentage of the deficiency. Also, if Act 129 of 1939 became operative through refunding the most the bondholders could recover would be a percentage of a percentage of a deficiency and when the last bonds to mature were matured and one final deficiency spread was made, they would still suffer a loss.

Appellees, who (p. 13 Brief for Appellants) are alleged to "concede that if it were not for the legislation enacted in 1937, the petition would have been sustained," deny completely the allegation. It has no substance in the record and misrepresents appellees position. We repeat, appellant's claim could not be sustained regardless of Acts 114 and 155 of 1937. The Michigan Court interpreted its drain law, as modified by the general tax law, in exact consistency with the contract rights of appellants unaffected by Acts 114 and 155 of 1937.

Appellants (pp. 13-14 Brief for Appellants), insisting that Acts 114 and 155 of 1937 deprived them of rights, pose this question "Was it possible, under the law as it existed when these bonds were issued, for privately owned lands in the district to be exempt from deficiency levies?" This question as framed begs the issue and invites a misconstruction of the tax laws. We submit the following questions to clarify the issue, keeping in mind that impairment is the primary objective.

1. Was the remedy for delinquency in drain assessments tied to the general tax law? (Appellants admit the answer is "yes.")

2. Does the legislature have the right to prescribe how tax liens shall be foreclosed? ("yes.")

3. Was appellant's contract subject to the legislative right to prescribe the method of foreclosure of tax liens? ("yes.")

4. Was the lien of the drain taxes treated on a par with other taxes? ("yes.")

5. Did drain districts receive the same ratio of proceeds of liquidation as other taxing units? ("yes.")

6. Did drain districts suffer the same ratio of loss as other taxing units? ("yes.")

7. Was there any discrimination in this process? ("no.")

8. Did the possibility of a diminished district through tax delinquency and title reversion to the state exist when appellants bought their bonds. ("yes.")

9. Was there any guaranty in the contract that the reverted lands would become again privately owned? ("no.")

10. Did the possibility exist of those lands forever belonging to the state? ("yes.")

11. Do appellants claim they would not then have suffered loss? ("no.")

12. Did the possibility of loss always exist for the purchasers of Michigan Drain bonds? ("yes.")

13. Did the passage of Acts 114 and 155 of 1937 aggravate their loss. "No, it salvaged the maximum as contrasted with," supinely allowing them (the lands) to accumulate tax delinquencies with no hope of ever recovering them. (*Baker v. State Land Office Board,* 294 Mich. 587, p. 606).

The allegation is made (p. 16 Brief for Appellants) "In as much as no deficiency assessment has ever been levied, and therefore no lien has been created, the drain district

receives no percentage of the proceeds of the scavenger sale to apply against a future deficiency assessment."

This statement is wholly unwarranted and quite remote from the truth. When the Drain Commissioner filed claim to the district's share of the proceeds of the scavenger sale under Act 155 of 1937, the entire amount due plus the legal statutory interest, was the amount claimed and on which the ratio of distribution was made. If a deficiency levy had been made that day, the same amount would have been spread that was claimed from the state. Counsel inadvertently errs in the foregoing statement.

When counsel attempts to show discrimination between drain bondholders (p. 7 Brief or Appellants) and other municipalities, because they can again levy tax for general obligations when the lands are in private hands and the holders of drain bonds cannot so participate, he completely overlooks the distinction between special and general obligation bonds. The special obligation was no better than its value on liquidation plus revenue from the remaining, live, sources such as tax paying lands and units assessed at large. The general obligation of municipalities was still intact as an obligation of the municipality, retireable from general taxation. Counsel erroneously uses the words "municipal bond" (p. 17 Brief for Appellants) as being snyonymous with "special assessment bonds" and special assessment bondholders know that they do not have a general obligation when they purchase and know that they may suffer loss through reversion of lands to the state.

Making general answer to appellant's claim that "the (drain) bondholders are at a disadvantage" and stand to lose a substantial portion of their investment, we reply as follows:

1. The purchasers of drain bonds speculated the same as any purchaser of securities and the hazard of loss was incident to the speculation;

2. Purchasers of homes speculated in the purchase and were wiped out by thousands;

3. If sanctity attached to either we are forced to conclude that there is nothing more sacred about a bondholder than a home owner;

4. The rights of the few must yield to those of public.

Appellants claim (p. 19 Brief for Appellants) that the decision of the Michigan court prevents them from, "obtaining payment from the remaining lands and the districts at large." Reference to that opinion, (R. 40-47, p. 46) discloses that the units assessed at large are still liable for their portion of any deficiency and the remaining lands in the district are liable also for their portions of the deficiency. In other words, as appellees interpret the decision, the deficiency would be ascertained, principal and interest, then spread as follows:

Oakland County at large.....	3.5%
Troy Township	2.5%
Royal Oak Township.....	6.5%
Village (now City) of Clawson..	10.0%
District 35% of 77.5% or.....	27.125%
Total recoverable	49.625
Loss to bondholders.....	50.375 of deficiency

At no time between the passage of Act 316 of 1923 (the general drain law) and Act 129 of 1939 did a drain bond holder have right to expect more than the above formula would provide in case of a deficiency. If the bonds issued

in the interim were refunded and Act 129 of 1939 became applicable as a result of a deficiency existing after the refunding, then deficiency spreads could have been made each year that a deficiency existed without waiting for all of the bonds to mature, which would have tended to reduce appellant's loss *but Act 129 of 1939 is not here involved because no refunding has taken place.*

Acts 114 and 155 of 1937 did not in any way change the formula suggested above: It would have been the law if those two acts had not been passed. It was the law, unadjudicated but still the law when appellants bought their bonds. *There can be no impairment.*

Appellees have no quarrel with the law laid down in *Von Hoffman v. City of Quincy,* 4 Wall. 535, cited pp. 19-20-21 Brief for Appellants, but we do say that it has no application here other than abstractedly because the Michigan decision gives bondholders everything they were ever entitled to, namely the benefit of the law as it existed when they purchased their bonds (and by way of distinction general obligations are discussed in this case instead of specials).

The same is true as to *Siebert v. Lewis,* 122 U. S. 284, the judgment being a general obligation and the *W. B. Worthen Co. v. Kavanaugh,* 295 U. S. 56, case in no way conflicts with the Michigan decision because if we concede that the slightest impairment is as offensive as the greatest still if *no* impairment exists the holding of the case is not violated in any respect.

The case of *Board of Education of Lincoln Park v. Board of Education of City of Detroit,* 245 Mich. 411, in no way conflicts with appellee's theory here. This case holds that bondholders have a right to look to their "full security." We grant that this is the law and say:

1. The bondholders had their full security on 65% of the drain district, complete foreclosure, sale at auction and participation in the proceeds under the general tax law as their contract called for. If the right to reassess under their contract, conflicted with the extent to which the general tax law modified the drain law, which was also a part of their contract, then the general tax law must be construed to supersede the drain law.

2. The bondholders have now, all rights against the remainder of the district and the municipalities at large, that they had when they purchased their bonds. Having this, there can be no impairment.

On pp. 24-25-26 (Brief for Appellants) are cited may Florida cases which appellants "believe contain the rule applicable here" namely that, "after municipal debts predicated upon the exertion of local taxing power are created, the taxing power cannot be so reduced as to prevent the payment of such debts." At the expense of repetition we say the general statement is true, but such is not the case here. Appellants had the benefit of the law existent when their bonds were purchased. Acts 114 and 155 of 1937 salvaged a portion of their investment along with the security of the State, their liens are intact on the remaining lands and their obligations recognized by the municipalities at large. To ask for more is to ask that their contract be broadened beyond its scope. Their debt was never insured or guaranteed.

Their investments were made voluntarily, subject to the law of the land, the contract had been partly performed, will be further performed under the Michigan decision and all of its benefits are available to them. The hazard of loss, assumed when the bonds were purchased, must go along with the fruits.

3. Appellants criticize the *Baker v. State Land Office Board* case, 294 Mich. 587, and say it upheld a law authorizing the "cancellation of debts" (p. 26, Brief for Appellants) and say further that the Michigan court did not understand the Blaisdell case, 290 U. S. 398 (pp. 27-28, Brief for Appellants).

We refrain, in the interest of brevity, from further discussion here and leave the matter of conclusions to this court. Acts 114 and 155, P. A. 1937 were impartial in operation. Instead of the State acquiring title from from encumbrance five years after purchase, the redemption period was shortened and under Act 114 of 1937, the State acquired title quickly. Counsel admits the State could do this (p. 26, Brief for Appellants). *No liens survived when the State took title.* All were extinguished. Were these bond holders a privileged class? No! All were treated alike. Day by day the possibility of return on their investment became more remote. The snowball of depression was accelerating and threatened to consume all. A wise legislature, exercising a sovereign police power, checked the flood, freed the drowning lands of the weight of existing taxes and liens and floated the ship of State safely into harbor. Now that the crisis is passed, these appellants would "thrice deny their Savior," in the Circuit Court, in the Michigan Supreme Court, and here. Ingratitude is truly the reward of the world.

CONCLUSION

In concluding, appellees respectfully submit:

1. No contract rights have been impaired and Art. I, Section 10, U. S. Constitution has not been violated;

2. The decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

SUPPLEMENTAL CITATIONS FOR APPELLEES

In view of the fact that the "Reply Brief for Appellants," was filed too near the call of the case (April 27th) to permit of answer coupled with the fact that Appellants' argument introduced a theory of law with which Appellees violently disagreed, it became necessary to supplement the citations in Appellees' brief; hence in pursuance of the request of the court, Appellees respectfully submit the references to the cases and statutes referred to, with a brief explanation of their applicability.

IN RE MOTION TO DISMISS AND MERITS

Assuming that both Acts 114 and 155 of the Michigan P. A. for 1937 were drawn in question in the Michigan court, "Was it necessary to a disposition of the case, for the Michigan court, to pass on their constitutionality?"

Appellees cited in their brief (p. 1) *Auditor General v. Clifford*, 143 Mich. 626, p. 630, which held:

> "The general rule is that a sale and a conveyance in due form (by the State) for taxes extinguishes all prior liens, whether for taxes or otherwise. This rule is one of necessity, growing out of the imperative nature of the demand of the government for its revenues."

Thus a new chain of title started, free of liens and encumbrances, when the state sold land to which it had acquired absolute title. This was the law in 1906 when the above case was decided.

The drain act was passed in 1923, Act 316 of 1923.

The Appellants bought their bonds in 1927, November 1st.

The case of *Krench v. State of Michigan* (not cited in brief), 277 Mich. 168, decided in 1936, on p. 179, says,

> "The State held title in fee simple. The original title had come to an end and a new chain of title originated with the State * * *. The State, having title in fee, could, like any other owner in fee, deed with reservation of the oil, gas and minerals."

Acts 114 and 155, the acts which Appellants claim violated their constitutional rights, were passed in 1937.

Subsequent to the effective date of Acts 114 and 155 namely in May of 1942 the case of *Meltzer v. State Land*

Office Board (not cited in brief) was decided by the Michigan Supreme Court, 301 Mich. 541 and on p. 544 the court said,

> "Prior to November 29, 1939, title to the land in question was in F. Homer Newton, Charles H. Newton, Osmun Wigg, William Fox and Mildred, his wife. The taxes thereon being delinquent for the years 1930 to 1935, inclusive, the entire parcel was sold by the county treasurer at the annual tax sale in May, 1938, and bid in to the State of Michigan. On November 29, 1939, the equity of redemption not having been exercised by any of the owners, the Auditor General deeded the land to the State. *Thereupon, the State of Michigan became the owner of the title in fee and a new chain of title was started. Krench v. State of Michigan,* 277 Mich. 168; *Rathbun v. State of Michigan,* 284 Mich. 521." (Emphasis supplied.)

It should be noted that the above decision was not grounded on Acts 114 or 155 of 1937 but the basic law urged by Appellees.

Thus from 1906 to 1942, a period which spans the passage of the drain law, the purchase by Appellants of their bonds and the passage of Acts 114 and 155 of 1937, a new chain of title, free from liens and encumbrances, started when the State sold lands to which it held absolute title.

There could not possibly be any impairment of Appellant's contract, nor could there be any necessity for the Michigan Supreme Court to pass on the impairment claim of Appellants because the basic law was never changed during the whole period, 1906 to 1942. Every right possessed by Appellants when they purchased their bonds, still exists.

The Motion to Dismiss should be granted based on *Honeyman v. Hanan,* 303 U. S. 206, *Southwestern Bell Telephone Co. v. State of Oklahoma;* 300 U. S. 206, because,

> "A law enacted after the making of a contract which merely clarifies a prior law does not impair the obligation of the contract." *Garland Co. v. Filmer,* 1 Fed. Supp. 8 (not cited in brief).

QUERIES

Mr. Justice Douglas inquired as to the effect of the "perpetual lien" phrase in Sec. 5 (M. S. A. 11.91) Chapter X Act 316 of 1923, quoted in full pp. 2-3 of Appellee's brief. In reply Mr. Hudson for Appellees drew an analogy between that phrase and the language of section 40 of the general tax law (not cited in brief) M. S. A. 7.81 which reads as follows,

> "The taxes thus assessed shall become at once a debt due to the township, city, village and county * * *, become a lien upon such real property and the lien for such amounts and for all interest and charges thereon shall *continue until payment thereof.*" (Emphasis supplied.)

It seems to follow that, "perpetual" as used in the drain law is synonomous with "continue until payment thereof" in the general tax law, and in view of the fact that drain liens are foreclosed under the tax law, M. S. A. 11.91,

> "All drain taxes assessed under the provisions of this act (the drain act) shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected."

that under the cases cited above, namely, *Auditor General v. Clifford, Krench v. State of Michigan,* and *Meltzer v. State Land Office Board,* both liens terminate when the state acquires absolute title.

In view of the inquiry by the Chief Justice as to when the lien of drain tax installments fixed, it becomes pertinent to explain the following:

> M. S. A. 11.56: "Upon the release of the right of way and damages, or upon the determination and return of the special commissions (special commissioners appointed to determine necessity, see M. S. A. 11.48, 11.49, 11.50, 11.51, 11.52, 11.53), the (drain) commissioner shall make his final order of determination establishing the drain, which drain shall be divided into convenient sections for the letting of contracts. * * * He shall before the day of letting and review, apportion the percent of cost of construction of such drain which any township, city or village traversed or benefitted thereby shall be liable to pay by reason of the benefit to the public health, convenience or welfare * * *. He shall also apportion the per cent of the benefits to accrue to any piece or parcel of land by reason of the construction of such drain over and above the percent apportioned to any township, city or village at large or to any highway as above provided. * * *."
>
> M. S. A. 11.57: "All apportionments of benefits under the provisions of this act shall be upon the principle of benefits derived * * *."

M. S. A. 11.61 and 11.62 provide for a board of review.

M. S. A. 11.66 provides for legal review by certiorari and contains this significant language,

> *"If no certiorari be brought within the time herein prescribed (10 days) the drain shall be deemed to*

have been legally established, and the taxes therefore legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity."

The case of *Lindsay v. Eastwood,* 72 Mich. 336, referred to in court but not cited in Appellee's brief, although decided in 1888 interpreted language practically identical with the present statute, to-wit:

Lindsay v. Eastwood	*Present Statute M.S.A. 11.91*
The statute under which this ditch tax was assessed declares: "The taxes assessed upon any lands under the provisions of this act shall be, and are hereby, declared to be a perpetual lien upon such lands, to remain such until such taxes, with all lawful costs, interest, and charges, are fully paid, or otherwise legally discharged."	• • • "All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid." (C. L. '29, sec. 4927.)

and on page 338 the court said,

> "The question presented is, when do such taxes (drain) become a lien upon the land? We are of the opinion that they become a lien as soon as they become a charge on the land by the assessment of benefits made by the drain commissioner."

The foregoing *Lindsay* case is cited with approval in *Jacobs v. Union Trust Co.,* 155 Mich. 233, where the court says, p. 236,

> "It is and has always been fundamental, in our revenue system, that a lien upon real estate exists for the purpose of collecting taxes levied thereon.", and "We are of opinion that as between a vendor

> and a vendee of land, in the absence of express statute provision, a lien upon the land for unpaid taxes does not exist until the amount thereof is ascertained and has become a charge which may be discharged by payment."

The exhibit (R. 56A) the original of which in colors was presented in court shows that 11% of the district was paid in full and Appellants frankly admit, p. 11 Brief for Appellants,

> "Upon confirmation of the assessment roll the assessments become liens declared to be perpetual until they are paid, with all lawful interests, costs and charges * * *. The taxpayer (p. 12) may, if he so desires, pay the entire assessments or may pay it in installments."

While the record does not show the date of confirmation of the assessment roll the court could take judicial notice of the fact that it preceded the issuance of the bonds which are dated November 1st, 1927 (Brief for Appellants, bottom p. 3) thus the lien for the entire cost, in the percentages fixed, attached in 1927. When title passed to the State upon failure of anyone to redeem all liens were cancelled. The deferred installments had, in the eyes of the law, been levied, were all payable, were liens and hence were wiped out by the passage of title to the State.

Mr. Justice Jackson inquired as to whether the bonds were special assessment bonds or general obligation bonds. That they were special assessment bonds cannot be disputed in view of the Michigan courts decision in this case 306 Mich. 503, pp. 510-511, cited in Appellees' Brief pp. 5, 11, 27, where reference is made to the *Municipal*

Investors Association v. City of Birmingham, 298 Mich. 314. In this last mentioned case the Michigan court said,

> "Plaintiff says that the additional assessment sought in this case has not yet been levied against the premises and therefore was not a lien when the State acquired title pursuant to the terms of the general tax laws, and hence was not extinguished. In the Baker case (294 Mich. 587) it was claimed that there was nothing in the title of the general property tax law as amended by Act No. 114 of 1937, to indicate that it covered the cancellation of past as well as future taxes and special assessments or that municipalities which have borrowed in anticipation of the collection of taxes or issued special assessment bonds shall have such taxes and assessments cancelled. A review of the briefs filed in the Baker case shows that counsel for plaintiff herein filed a brief *amicus curiae* in which many of the cases relied upon by plaintiff in the instant suit were cited. Notwithstanding the fact that the court had those cases before it, the argument made was repudiated upon the ground that it was unnecessary to include in the title the nature of the interest secured by the purchaser upon the sale, as well as the specific tax incumbrances from which the property was freed in such proceedings, and the court concluded that the statutes in question do not contravene the requirements of the State or Federal Constitution forbidding the impairment of the obligations of contract."* (*Art. I, Sec. 10, U. S. Const.)

Michigan's well known Justice Cooley made the following statement in the case of *Dawson v. Aurelius Township,* 49 Mich. 479, p. 480,

> "The laying out of drains is commonly a matter of mere neighborhood interest; they affect small bodies of land; the taxes laid are local assessments and do not and cannot under the statute become a general charge. In the performance of his duties,

> the commissioner is in no sense the agent of the township and there is no township responsibility for his defaults or misconducts."

This case was decided in 1882 but was cited with approval by the Michigan Supreme Court as late as 1922 in the case *Township of Cooper v. Little,* 220 Mich. 62, p. 64. (Both cases cited in oral argument, but not in brief.)

If the bond is the contract and must look to the revenue to be derived from a special assessment district for payment then it follows that the bond is a special assessment bond as contrasted with a general obligation bond and a perusal of the Michigan decision in the Municipal Investors case 298 Mich. 314, pp. 318-19 leaves no doubt that the bonds there considered were special assessment bonds. The bonds in the instant case are likewise special assessment bonds having been issued on the theory of benefit, for a local improvement and being retireable from special assessment taxes on the lands benefitted.

Reference to the bond form (R. 7-8) shows that,

> "The principal and interest of this bond are payable out of the installments of drain taxes assessed against the lands in the said district and against the County of Oakland, the Village of Clawson and the Townships of Royal (fol. 12) Oak and Troy at large, in proportion to their respective taxation for such improvement as follows: lands in District 77.5%, Oakland County 3.5%, Troy Township 2.5%, Royal Oak Township 6.5%, Village of Clawson 10%," • • •.

Thus it is obvious that the bond is not a general obligation bond.

The Chief Justice also inquired as to whether or not all assessments had been levied and particularly if a deficiency assessment had been levied.

That all assessments had been levied appears positively in the language quoted from the drain law on pp. 5-6, this supplemental brief namely,

> *"If no certiorari be brought within the time herein prescribed (10 days) the drain shall be deemed to have been legally established, and the taxes therefore legally levied,* and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity."

Whether or not a deficiency assessment was made (when all bonds were matured) would not affect Appellants' claim here because they never had the right to assess lands the title to which had become absolute in the state (authorities previously cited) and they still have the right to a deficiency assessment against the rest of the lands and the municipalities at large in proportion to the original assessment. (*Keefe & Bradford v. Clark,* 306 Mich. 503—R. 40-47.)

SUMMARY

If we may be permitted to paraphrase, Act 114 of 1937 declared to the world:

1. Under the law in Michigan, when the State takes absolute title to property all liens and encumbrances are removed and cancelled.

2. You must redeem before the deadline or your interest in the property is gone forever and the State will become the absolute owner.

Act 155 of 1937 declared to the world:

1. We will sell the lands the State owns to the highest bidder but the bids must be equal to or more than 25% of the assessed valuation.

2. All taxing units including drain districts will receive their *pro rata* share of the proceeds.

3. The State owns these lands free and clear and will quit claim them that way.

4. Former owners or persons who had an interest are given a preference in the bidding so bid at the sale or forever hold your peace.

We respectfully submit,

A. Appellants have been deprived of no rights and consequently there can be no impairment of their contract.

B. The law after the passage of Acts 114 and 155 of 1937 is basically the same as it was when appellants bought their bonds, hence there can be no impairment of their contract.

C. If both Acts 114 and 155 were drawn in question in the Michigan Court still there was no necessity for that court to pass on their constitutionality, hence this court is without jurisdiction in the premises.

D. The Motion to Dismiss should be granted and the Motion to Affirm should be granted or decision made by this court consistent therewith.

Respectfully submitted,

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Supreme Court of The United States

OCTOBER TERM, 1943

No. 634

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Appellants,

vs.

EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and BOARD OF SUPERVISORS of Oakland County, CITY OF ROYAL OAK, Intervenor.

AMICI CURIAE BRIEF

FOR

THE STATE OF MICHIGAN

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AMICI CURIAE BRIEF
FOR
THE STATE OF MICHIGAN

I.

Request for Leave to File Brief Amici Curiae.

Comes now the State of Michigan, by Herbert J. Rushton, Attorney General of the State of Michigan and Edmund E. Shepherd, Solicitor General of the State of Michigan, and respectfully request permission to file brief, amici curiae, in the above entitled cause.

II.

Reasons for Request to File Brief.

The pendency of the above entitled litigation has but recently come to the attention of the office of the Attorney General for the State of Michigan and in view of the fact that the constitutionality of two important acts is involved, namely Acts 114 and 155 of the Public Acts of Michigan for the year 1937, the State of Michigan has a vital interest in the outcome of the pending litigation for the following reasons:

(a) Under the provisions of Act 114 of 1937, 582,430 parcels of land in Southern Michigan reverted to the State.

(b) Under the provisions of Act 155 of 1937, 526,145 of those parcels were offered for sale at public auction and 406,000 of said parcels were sold.

(c) The Supreme Court of Michigan has held both acts to be constitutional in decisions heretofore rendered.

III.

Statement of Position of the State of Michigan.

The Record, the Motion to Dismiss or Affirm and the briefs filed by Appellees have been perused and by leave of court and consent of counsel, the State of Michigan desires to adopt the brief of Appellees the same as if the same had been filed by the State of Michigan.

In addition thereto we respectfully wish to supplement the same as follows.

IV.

In re Appellee's Motion to Dismiss.

A. Act 114 of 1937.

We urge that a careful reading of the decision of the Michigan Supreme Court (R 40-47) will disclose that the Michigan court did not pass on the constitutionality of Act 114 of Public Acts of 1937.

We further suggest that the pleadings (R 2-7) do not present any question as to the constitutionality of Act 114 of 1937.

We further suggest that petitioners, "Statement of Questions Involved" (R 55) shows that petitioner did not consider the constitutionality of Act 114 of 1937 was involved. There questions were framed by petitioners and accepted as framed (R 56) by Appellees.

We further suggest that perusal of Appellants' brief in the Michigan Supreme Court discloses that no challenge was made to Act 114 of 1937 as being violative of Art. I, Sec. 10, of the United States Constitution.

Wherefore, under the holdings of this court in Honeyman vs. Hanan, 300 U. S. 14 and Southwestern Bell Telephone Company vs. State of Oklahoma, 300 U. S. 206, this court is without jurisdiction to pass on the constitutionality of Act 114 of 1937.

B. Act 155 of 1937.

Act 155 of 1937 prescribed the method for disposal of state owned lands; and how the proceeds of the sale should be divided (R 44). There is no contention by Appellants that they have not received their share of the proceeds of the sales. In view of the fact that, "the drain law must be read and construed together with the general property tax law of the State", and Act 155 of 1937 was an amendment to the general tax law, it is inconceivable that any constitutional rights of petitioners have been invaded by operation of Act 155. It enabled petitioners to salvage the full fruit of their security which otherwise would probably have been a total loss.

We respectfully submit that on the face of the whole picture as presented by petitioners no showing has been made and no persuasive argument adduced indicating that in any way have their rights been prejudiced by operation of Act 155.

V.

Argument and Law on Merits.

In the event this court does not dispose of this case on the Motion to Dismiss we respectfully submit the following:

Acts 114 and 155 of the Michigan Public Acts of 1937 were amendments to the general tax law of Michigan, Act 206 of 1893. Both acts fell in the classification of remedial legislation and are therefore entitled to liberal construction (*Wilson v. City of Pontiac*, 294 M 79).

Redemption rights were affected by Act 114 of 1937 but, "The right of redemption, however, is not a constitutional right but exists only as permitted by statute" (*Keeley v. Sanders,* 99 U. S. 441 — *Dumphey v. Hilton,* 121 Mich. 315) and, "Laws of retroactive character, affecting tax liens which attached prior to such enactment, are not unconstitutional." (*City of Detroit v. Safety Inv. Corp.,* 288 M 511). Statutes which "affect only a remedy for delinquency of the taxpayer • • • do not impair contract obligations or vested rights." (*Baker v. State Land Office Board,* 294 M 587, p. 599.)

Redemption rights were not affected by Act 155 of 1937 and petitioners have received all benefits of the act so no complaints can be made concerning it violating the obligation of contract.

The drain law, Act 316 of 1923, M.S.A. 11.91, "must be read and construed together with the general property tax law of the state" (R 43). The general property tax law was amended by Act 114 and 155 of 1937 and petitioners are complaining because the lands sold under the general tax law and unredeemed from the tax sale were freed from liens when the failure to free such properties from a tax burden exceeding their value would have aggravated a situation approaching disaster, produced nothing for petitioners to apply on their bonds and in addition held such properties fruitless as a source of revenue for all taxing units involved. The effect of these two Acts 114 and 155 of 1937 was to protect petitioners property and rights rather than to dissipate or impair them. Rapid return of 80% of these properties to the tax rolls is proof of the wise exercise by the state of its police powers used to stem an imminent condition of chaos brought about by unwise and over optimistic speculation

which resulted in the loss of homes by thousands of taxpayers through an unbearable tax burden aggravated by economic depression.

VI.

CONCLUSION.

1. Previous to the time appellants purchased their bonds and up to the passage of Act 114 P. A. of 1937 lands offered for sale and bid in by the state became the absolute property of the state five years after the sale, and when sold by the state were sold free from liens and encumbrances. (*Auditor General v. Clifford*, 143 Mich. 626, p. 630)

2. After the passage of Act 114 P. A. of 1937 the five year period in which the state acquired absolute title was shortened to approximately one year and the act specifically mentioned the fact that all liens were cancelled (this had previously been the law under the decision above referred to), and the only effect of Act 114 of 1937 was to accelerate the acquiring of absolute title by the state. Such legislation has never been held to violate the constitution. (Keeley v. Sanders, 99 U. S. 441; Dumphey v. Hilton, 121 Mich. 315.) This general statement of the law is also admitted by appellants (p. 26, Appellants' Brief).

3. Act 155 P. A. of 1937 prescribed the method of sale of lands to which the state had acquired absolute title and specified how the proceeds of the sale should be distributed and appellants have received their share of the proceeds. Consequently Act 155 deprives appellants of

nothing and can not be construed to impair their constitutional rights.

4. Neither Act 114 nor Act 155 of P. A. of 1937 construed severally or jointly deprive appellants of anything. They have been construed to be constitutional under the Michigan constitution by Baker v. State Land Office Board, 294 Mich. 587, and the argument of appellants that they violate Art. I, Sec. 10 of the U. S. Constitution should now be denied by this court.

We respectfully submit that:

1. Neither Act 114 or 155 of 1937 offends the provisions of Art. I, Sec. 10 of the U. S. Constitution.

2. The Motion to Affirm should be granted.

Respectfully submitted,

STATE OF MICHIGAN

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CITY OF ROYAL OAK, Intervenor

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS AND APPELLANTS

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS AND APPELLANTS

Andrew Jergens, an individual, resident of Cincinnati, Ohio, presents this, his brief as *amicus curiae*, in the above entitled cause. This brief is filed with the consent of counsel for all parties in interest to this appeal.

Your *amicus curiae* is the owner of bonds in the face amount of $150,000 issued by the Acacia Park Drain District, a drain district created in Oakland County, Michigan. Interest has accrued on these bonds in the amount

of $49,860, which remains unpaid. The bonds were issued on September 1, 1926, and were due and payable in full on September 1, 1936, such payment being in ten equal installments during the life of the bonds. Assessments to pay the installments on the bonds were not levied by the Oakland County Drain Commissioner during the years 1932 to 1936, inclusive.

Responsibility for payment of these bonds is divided in the following approximate proportions among certain municipalities and property owners who benefited by construction of the drain financed by the bond issue:

Municipalities	25%
Property Owners	75%

Sixty-four per cent of the properties charged with the payment of these drain bonds have passed to the State of Michigan prior to the present date on account of deficiencies in taxes and drain assessments. It has not been possible to ascertain what proportion of these properties which have heretofore passed to the State of Michigan have since been returned to private ownership by the medium of the scavenger sale conducted under Act 155 of Public Acts of 1937, as amended. However, a survey of 50 parcels of land taken at random from among the properties included in this drain district reveals that approximately 93% of such properties which were at one time held by the State of Michigan have been returned to private ownership. Of those which were repurchased in this fashion by private individuals, approximately 90% were repurchased at the minimum figure of 25% of the assessed valuation.

THE JURISDICTION OF THE COURT IS ESTABLISHED BY THE FACT THAT THE CONSTITUTIONAL VALIDITY OF ACT 155 OF PUBLIC ACTS 1937, AS AMENDED, WAS ADMITTEDLY PRESENTED TO THE MICHIGAN SUPREME COURT, AND ITS DECISION WAS NECESSARY TO A DETERMINATION OF THE CAUSE

The appellees rely upon the case of *Honeyman v. Hanan*, 300 U. S. 14 (1937), for the rule that the constitutional question must be presented to the State Court and ruled upon as an integral part of the decision. We adopt that rule as a fair statement of controlling principles. It is not disputed that the constitutionality of Act 155 of Public Acts 1937, as amended, was challenged below. But appellees attempt to establish that Act 155 of Public Acts 1937, as amended, was not material to the State Court's decision, and in support of their decision they set forth a wholly irrelevant portion of that Act in their brief (Page 9, Brief for Appellees on Motion to Dismiss). The section set forth relates principally to the distribution of the proceeds of the scavenger sale among the various Governmental entities and assessing units. The appellees state that this is the only contractual right created by Act 155 of Public Acts 1937, as amended. We do not contend that any contract rights were *created* by Act 155 of Public Acts 1937, as amended. We claim that substantial contract rights which were effectively created by the issuance of drain district bonds under certain Michigan statutes were *impaired and destroyed* by an entirely different section of Act 155 of Public Acts 1937, as amended, which the appellees have seen fit to ignore. Section 9 of that Act, in prescribing the form of conveyance of property to purchasers states:

> "The board is authorized, for and on behalf of the State of Michigan, to execute, with the seal of

the board attached, such quit claim deeds, land contracts, leases or other contracts, documents or papers as may be necessary to carry out the provisions of this act. Any quit claim deed or deeds executed by the board or department shall convey title in fee to land under the provisions of this act, free from any encumbrances, including all taxes and special assessments which were cancelled by the decree pursuant to which the state obtained title, except as herein otherwise provided.'"

Appellants here sought to accomplish only one object. That was to require the Drain Commissioner of Oakland County to levy a deficiency assessment against all property owners resident in the Drain District under the authodity of Act 316 of Public Acts 1923, as amended (Record page 4). The respondent Drain Commissioner declined to levy the assessment against property owners whose titles stemmed from purchase of such property from the State of Michigan under the authority of Act 155 of Public Acts 1937, as amended. His reasons were obvious. These property owners were the holders of deeds which purported to vest title in them free from any pre-existing obligation on the land. The Drain Commissioner would have subjected himself to immediate legal resistance based upon rights created by Act 155 of Public Acts 1937, as amended. His refusal to take the action requested was upheld by the Michigan Supreme Court by reason of its determination that Act 155 of Public Acts 1937, as amended, effectively prevented the exercise of contract rights vested in appellants. The impairment of contract here complained of was accomplished by Act 155 of Public Acts 1937, as amended. Were it not for its operation the situation in which these bondholders find themselves could not have possibly arisen.

It is therefore submitted that the jurisdiction in this Court is clearly established under *Honeyman v. Hanan*,

supra, because the constitutional question raised by the barrier of Act 155 of Public Acts 1937, as amended, was the very essence of the question determined by the Michigan Supreme Court.

UNTIL PASSAGE OF ACTS 114 AND 155, AS AMENDED, APPELLANTS HAD CONTRACT RIGHTS WHICH ASSURED FULL COLLECTION OF THEIR BONDS

Appellees have insisted that the appellants have lost no rights by reason of the operation of Acts 114 and 155 of 1937, as amended. They state:

> "The purchasers of a Michigan drain bond *never*, under the Michigan law, have the right to expect 100% payment of principal and interest if part of the lands in the district reverted to the State." (Page 22, Brief for Appellees.)

We dispute the statement above set forth, and we will attempt to define the extent of appellants' rights before the passage of the acts in question.

Michigan drain taxes to pay drain bonds are to be collected in the same manner as other taxes under the Michigan law.

> "All drain taxes assessed under provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes * * *." *General Drain Law, Chap. 10, Sec. 5; 1 C. L. 1929, Sec. 4927; Stat. Ann. Sec. 11.91.*

Hence, reference is made to certain Michigan tax statutes for a further definition of rights.

Michigan Procedure in Regard to Delinquent Taxes and Drain Assessments

The procedure with respect to delinquent tax property is as follows:

The County Treasurer is to prepare a transcript of delinquent taxes each year and transmit the transcript to the Auditor General of the State of Michigan. *(Stat. Ann. 7.101.)* All lands thus returned to the Auditor General as delinquent for taxes are subject to disposition, sale or redemption for the enforcement of such tax lien. *(Stat. Ann. 7.104.)* The Auditor General is to prepare and file in each county in which lands are to be sold for taxes a petition addressed to the Circuit Court for said county in chancery containing a list of all lands in such county upon which taxes are delinquent for more than one year after they were returned as delinquent. Whereupon, a final decree is entered by the Circuit Court in favor of the State of Michigan for the total delinquent taxes, along with interest and charges. *(Stat. Ann. 7.105.)* The delinquent property is to be offered for sale for the total amount of taxes and interest each year, and if no bid is made the County Treasurer is to bid off the same in the name of the state. *(Stat. Ann. 7.115.)* For the five ensuing years the delinquent property is to be offered each year for sale for the total of delinquent taxes against the property.

Rights of Appellants at This Point

At any time during the five-year period following delinquency the properties subject to drain taxes would be offered for sale and the purchaser would be required to pay all delinquent taxes and drain assessments, which would result in restoring the full amount of the assessment to the county drain fund as further security for payment of appellants' bonds.

Appellants' Rights Against General County Funds

The Michigan legislature, recognizing that the property concerned might possibly not revert to private hands immediately, and wishing to give full protection to the bondholders, enacted in 1927 an amendment to the General Drain Law, (Act 331, Public Acts 1927, Section 15), which provided as follows:

> "* * * In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore or hereafter issued when they become due the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the county shall not cause the total debt of the county to exceed the constitutional limitation thereof."

(The subsequent repeal of this Section by the Michigan Legislature is expressly inapplicable to appellants' bonds. (*Stat. Ann. 11.101;* Opinion of Oakland County Circuit Court, Record page 29.))

This statute, giving authority to pay the bondholders from the general fund of the county in case the amount available in the drain fund was insufficient to pay the principal or interest of any such bonds, was construed by the Michigan Supreme Court as conveying a remedial mandatory right and that the bondholder could bring an action in mandamus to force the county officers to make payment from the general county fund. *University of Michigan v. Pray,* 264 Mich. 693 (1933); *Moore v. Harrison,* 224 Mich. 512 (1923); *Whitman v. Township of Royal Oak,* 269 Mich. 146 (1934). Since the county is obligated to pay all deficiencies to the bondholders and this right has been held to be mandatory, it was necessary to permit

the county to purchase the delinquent tax lands to protect their disbursements from the general fund. Therefore, a statute permitting the county to buy such lands was passed, being *Act 260, Public Acts 1931; Stat. Ann. 7.941* providing as follows:

> "Sec. 1. The Boards of Supervisors of counties are hereby authorized to appropriate money and purchase lands at the statutory sale of lands for delinquent drain assessments. In case of the purchase of such lands, such Boards are also authorized to appropriate money and purchase the same lands if they are tax delinquent at the statutory sale by county treasurers for delinquent general property taxes, it being the intent of this act to afford protection to the investment that counties may have in drains: provided, that in the case of lands which have been bid off by the state at sales in nineteen hundred thirty-one (1931) for delinquent drain assessments and taxes, the county shall have the right to purchase such lands from the state as provided by the General Tax Law for the amount of the bid of the state and interest at six per cent (6%) per annum."

Rights of Appellants at This Point

1. Appellants may secure reimbursement for all delinquent drain assessments from the general fund of the county, such payments by the county to be again added to the drain fund as additional security for payment of appellants' bonds.

2. In event the county exercises its prerogative conferred by Act 260, Public Acts 1931, the full amount of delinquent drain assessments will be paid by the county.

Appellants' Rights to Levy an Additional Drain Assessment After Return of Delinquent Property to Private Hands

Assuming that the deficiency in the drain fund is not reimbursed by the county under General Drain Law, and also assuming that the county did not purchase these lands for the protection of its drain investment as it was authorized to do, and further assuming that no person had purchased the delinquent property at any of the sales occurring over the five-year period heretofore described, the delinquent property would vest in the State of Michigan. (Stat. Ann. 7.181.)

The State of Michigan is authorized to sell properties so acquired to private persons at a minimum price to be fixed by the Director of Conservation and the Auditor Generally jointly, the proceeds to be distributed to the various taxing districts. Immediately after sale to private persons these properties would become liable for future assessments by the drain district. The right to future assessments was held by the Michigan Supreme Court to apply to future assessments of drain taxes on property which was previously owned by the state and which had passed to private ownership. *University of Michigan v. Pray, supra; Case v. City of Saginaw*, 196 Mich. 687 (1917). The concurring opinion of Justice Fellows in the latter case contains the following statement at page 693:

> "• • • I think it sufficient to hold, and that we should hold, that special assessments which are to fall due in the future and for the payment of which these lands were not delinquent when bid off to the state are not 'taxes charged against such lands in the office of the Auditor General at the time they are deeded to the state'; that the lands were not

liable for special assessments falling due while they were owned and held by the state, but were liable for such special assessments as became due after they became subject to private ownership."

Rights of Appellants at This Point

1. Appellants were entitled to receive a proportionate share of the proceeds of sale by the State of Michigan to private purchasers to apply on delinquent assessments.

2. Appellants, through the medium of the Drain Commissioner, had the right to levy installment assessments which were unassessed at the time of sale of the property by the State of Michigan to private owners.

Right to Levy Additional Assessment Upon Maturity of Bonds

It is specifically provided by a Michigan statute that where there is insufficient money in the fund of a particular drain district at the time of the maturity of the drain district bonds to pay the bonds in full, an additional assessment may be levied to make up the deficiency. *(Stat. Ann. 11.104.)* It was further provided that this right of assessment could be exercised regardless of the fact that full payment had been made by the owners of particular parcels of land in the drain district. This right to reassess all lands in private ownership to make up any deficiency, regardless of whether or not these lands had gone through a tax sale, or whether the owners of other parcels had fully paid their respective assessments, was upheld in the following decisions of the Michigan Supreme Court: *University of Michigan v. Pray, supra; Bump v. Jepson,* 106 Mich. 641 (1895).

Rights of Appellants at This Point

If at the time of maturity of the drain district bonds there was a deficiency in the drain district fund which prevented full payment of such bonds, appellants had the right to cause a reassessment to be levied to cover this deficiency which would be borne by all property under private ownership included in the drain district.

APPELLANTS' CONTRACT RIGHTS ARE IMPAIRED BY ACTS 114 AND 155 OF 1937, AS AMENDED

Appellants' Right to a 5-Year Period During Which the Property Concerned Could Be Sold For Not Less Than the Total Amount of All Taxes and Interest Due Is Taken Away

Under Section 67a of Act 114 of 1937, as amended, the time during which property may be sold for delinquent taxes and drain assessments was fixed at one year. At the end of that time absolute title was vested in the State of Michigan and all delinquent taxes and assessment liens were cut off. The shortening of the period from five years to one year works to the disadvantage of the appellants in that the owner is deprived of this extension of time during which he may pay the delinquent assessments. Furthermore, the reduction of the previous five year period to one year considerably lessens the possibility that land values will improve to an extent which will make probable a redemption from delinquency.

Appellants Apparently Lose the Right to Require Payment From the General County Fund If There Are Insufficient Amounts in the Drain Fund

Perhaps the most important right of appellants is their mandatory right to require payment from the general

funds of the county when there is an insufficient amount in the drain fund. The cases holding that this provision is mandatory are based specifically on the fact that the county fund is to be later reimbursed from the drain fund. This was stated by the Court in the case of *University of Michigan v. Pray, supra* (page 700), as follows:

> "Regardless of the temporary advancement by the County, in the end payment is by the drainage district. If the first assessments are inadequate, there is express statutory provision for an additional assessment upon the drainage district."

Acts 114 and 155 of Public Acts 1937 as amended combine to remove the right of reassessment upon property returned to private ownership through the operation of Act 155, according to the holding of the Michigan Supreme Court in this cause. Since 47% of the properties here involved would thus be immune from reassessment, it is clear that the drain fund will never be able to collect sufficient amounts to reimburse the county for advances made to the bondholders. Since the county may not reimburse itself, it is entirely probable that it will resist payment of the deficient amount to the bondholders from the county general fund, on the ground that it would be unconstitutional to require the general funds of the county to be liable for the construction of a drain project which would only benefit a favored few. This opinion is shared by the Oakland County Circuit Court in the present case, which states as follows (R. 30):

> "When a case is established, as may be possible with the East Clawson Drain District, that exceeding county liability ensues through the hopelessness of reimbursement, that the orderly functions of county government are imperiled through advancement, that the county is building projects of great magnitude for the restricted benefit of a few at the

expense of all, the limitations on advancement, here suggested as logically existing, may be found."

Thus, the appellant will be barred from obtaining complete reimbursement from the general county fund by the operation of Acts 114 and 155 of 1937 as amended.

Appellant Loses the Right to Make Future Assessment On All Property in Private Hands Which Has Been Purchased from the State

As previously demonstrated, appellants had a contractual right prior to Acts 114 and 155 of 1937, as amended, to make all future assessments against all property owned by private parties in the district regardless of whether or not title had passed through the state. In the present case this would amount to 60% of the total assessment as these installments have never been levied. This right is completely taken away and a "substitute" is given by Section 10 of Act 155 of 1937, as amended, which provides in effect that appellants will receive their share of the funds received by the state. This means that although the property was sold because of tax delinquency which was only 40% of the total assessment, the appellants' general lien is accelerated in order to make the total amount become due at the time of sale by the state. If the land owner could not pay 40% of the total assessment, it is very unlikely that the appellants will receive any substantial part of the 60% which was unassessed at a sale of the property by the state for a minimum of 25% of its assessed valuation. Thus the so-called "substitute" right of receiving its share of the proceeds of a sale on a 100% basis is illusory and really results, as a practical matter, in a total loss of the 60% which might possibly be assessed in later years in installments on the property concerned.

Appellants Lose Completely the Right of Reassessment Upon All Property in the Hands of Private Parties That Has Passed Through the State

To illustrate the possible value of this right, if all the land which passed through the state was in the hands of private parties at the time of this reassessment, any deficiency which had been incurred through previous deficiency sales would be completely wiped out and the appellants would recover the total amount of their investment. Any percentage of land that had gone back to private parties through sale by the state would increase by that percentage the amount of recovery. There is no substitute given under Acts 114 or 155 of 1937, as amended, and the Supreme Court of Michigan has held that under these circumstances all right of reassessment is thereby cut off. (Michigan Supreme Court decision in present case.)

THE IMPAIRMENT SHOWN IS IN VIOLATION OF ARTICLE I, SECTION 10, CLAUSE 1, OF THE CONSTITUTION OF THE UNITED STATES

The opinion of the Michigan Supreme Court in this cause relating to the constitutionality of Act 155 of Public Acts 1937 states with respect to the constitutional question involved:

> "We cannot, therefore, say that the bondholders' contract has been impaired when they received the maximum benefit under the circumstances." (Record page 45.)

The reason stated appears to boil down to the proposition that a valid and subsisting contract may be amended by state action and that a contracting party may not be heard to complain of a contract impairment if he salvages

something from the final settlement. This is not our understanding of the law. It appears also not to be the understanding of appellees, who state in commenting upon *W. B. Worthen v. Kavanaugh*, 295 U. S. 56 (1935):

> "• • • If we consider that the slightest impairment is as offensive as the greatest, still if no impairment exists the holding of the case is not valid in any respect." (Brief for Appellees, page 37.)

The law is well settled that in order for a statute to be unconstitutional there need not be an actual destruction of the contract obligation if it impairs the obligation in any manner or renders it less operative. This general principle was well illustrated by the case of *Cotton v. Walton-Verona Independent Graded School District*, 174 S. W. (2d) 712 (1943), in which the court stated as follows:

> "A statute, to be unconstitutional as 'impairing obligation of contract' need not import actual destruction of such obligation, but is inoperative if such obligations are impaired in any degree, weakened or rendered less operative by statute."

Holding in the same manner is the case of *Lapsley v. Brashears*, 4 Litt., Ky., 47 (1823), in which the court stated as follows:

> "Impair does not mean destroy. Therefore, every state law which weakens the obligation of a contract or renders it less operative is unconstitutional."

Appellees stress the necessity of enactment of Acts 114 and 155 of 1937, as amended, in justification for their application to the rights of appellants. We feel that it is one thing to extend the term of a contract during periods of depression so that both the obligor and the obligee will be benefited by the extension, but we feel that it is quite

a different thing to reduce the value of a valid and subsisting contract by approximately 47% by removing practically all of the means of collection of amounts owing under that contract. That is exactly the result of the acts complained of. The right of the State of Michigan to defer or cancel the collection of taxes owing to the various municipalities is not in dispute. That right was extended, however, to destroy the rights of a very substantial group of Michigan investors who had advanced funds for worthwhile civic improvements, and who had the right under the terms of their contracts and the statutes then existing to make full collection of such obligations.

The purpose of the acts complained of, in the greater sense, was to cancel out an overwhelming burden of tax liability which had accrued during the depression period. Unfortunately, the language of these acts was broad enough to include the collection methods for payment of drain district bonds. The liability of these drain district bonds against each parcel of land in the large drain districts created is relatively negligible as compared with the tax liability. The desired result could have been accomplished without impairing the rights of these bondholders. If the court finds the acts unconstitutional in their application to the rights of holders of drain district bonds, the larger objective will have been accomplished, because both Acts 114 and 155, as amended, contain separability clauses in event they are found unconstitutional. Furthermore, under other Michigan statutes equitable funding plans for the payment of these obligations over a period of a number of years may be formulated.

CONCLUSION

We therefore submit that Acts 114 and 155 of Michigan Public Acts 1937, as amended, are in violation of Article I, Section 10, of the Federal Constitution with respect to these appellants, and we ask that the judgment of the Michigan Supreme Court be reversed.

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SUPREME COURT OF THE UNITED STATES.

No. 634.—October Term, 1943.

Kenneth M. Keefe and Wallace D. Bradford, Appellants,
vs.
Earl L. Clark, Drain Commissioner of Oakland County, Michigan, and Board of Supervisors of Oakland County, City of Royal Oak, Intervenor.

On Appeal from the Supreme Court of the State of Michigan.

[May 22, 1944.]

Mr. Justice Black delivered the opinion of the Court.

In this case appellants argue that certain provisions of two Acts passed by the Michigan legislature in 1937 are void in that, contrary to Art. I, sec. 10 of the United States Constitution, they impair the obligation of special assessment drain bonds issued in 1927, some of which are owned by appellants. The case is here on appeal from the Supreme Court of Michigan. 28 U. S. C. 344(a).[1]

So far as here relevant, the two Acts[2] said to be unconstitutional provide that parcels of land subject to special assessment for drain projects may be sold for unpaid taxes, and also provide that the purchaser at such a sale shall be granted a title free of all encumbrances, including all assessments for drain projects already constructed. The proceeds of each tax sale are applied towards payment of the unpaid drain assessment on the particular parcel of land, as well as towards payment of other delinquent taxes. Pursuant to these Acts, the State of Michigan has sold tax delinquent properties located in the drain district which issued ap-

[1] Appellees have moved to dismiss the appeal on the grounds that a federal question was not properly raised in the state courts. The record fails to sustain the motion and it is denied. See Whitney v. California, 274 U. S. 357, 360.

[2] Act 114, Mich. Pub. Acts of 1937, as amended by Act 282, Mich. Pub. Acts of 1939 and Act 234, Mich. Pub. Acts of 1941.
Act 155, Mich Pub. Acts of 1937, as amended by Acts 29, 244, and 329 of Mich. Pub. Acts of 1939 and Act 363 of Mich. Pub. Acts of 1941.

pellants' bonds. The deeds of sale purport to release the properties from all encumbrances, including all assessments on account of the 1927 drain project.

Appellants do not contend that the challenged Acts impair any term of the contract printed on the face of their drain bonds. What they contend is that the Acts impair a right secured to them by a statutory provision which was the law of Michigan at the time their bonds were issued and which, they say, became a part of the bond contract. See *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550. The statutory provision upon which they rely reads:

"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, . . . it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency." Chapter X, § 18, Act 316, Mich. Pub. Acts of 1923, as amended by Act 331, Mich. Pub. Acts of 1927.

Appellants' argument is that this statute has given them an indefeasible right to have a deficiency assessment levied on each privately owned parcel of land in the drain district, regardless of whether a particular parcel already has been sold at a tax sale and the proceeds applied toward payment of the drain bonds. In practical effect, they assert that by this statute lands subject to assessment for their drain bonds are subject to be sold not just once, but twice, for payment of the single benefit which the lands received from the original drain project. Consequently, their argument runs, the Michigan legislature was powerless to provide that purchasers of tax-delinquent property in the drain district be exempt from a deficiency drain assessment.

This argument the Supreme Court of Michigan refused to accept. Emphasizing the serious consequences of such a hobbling of the State's powers to meet pressing problems, the Court pointed out that the power of the State to sell tax-delinquent lands free of the burden of assessments for completed drain projects was essential not only to protect the bondholders themselves but to protect the public interest. Without power in the State to offer an attractive title to prospective purchasers, the Court found, many of such lands would remain tax-delinquent and thereby be rendered valueless for all public revenue purposes, including drain assessments. The Court declined to read into the statute relied upon by appellants any purpose to permit drain districts to sur-

render the State's sovereign power to provide for the sale of tax-delinquent property free of encumbrances. It held that under the Michigan law in effect when appellants' special assessment drain bonds were issued the bondholders' "maximum security" for payment of assessments against drain district lands was the parcels of land themselves, and that when the bondholders received their fair share of the proceeds derived from the tax sale of any particular parcel they had received everything to which their bond contracts entitled them. *Keefe* v. *Oakland Co. Drain Com'r*, 306 Mich. 503, 511-512.

Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed. This rule of construction applies with special force in the case at bar, for the interpretation of the bond contract urged by appellants would result in a drastic limitation upon the power of Michigan to enact legislation designed to remedy a situation obviously inimical to the interests of both municipal creditors and the general public.[3] "The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 548; and see *Gilman* v. *City of Sheboygan*, 2 Black 510, 513; *Fisher* v. *New Orleans*, 218 U. S. 438.

We do not find in the provision of the drain statute relied upon by appellants a clear and unequivocal purpose of Michigan to per-

[3] The Michigan Supreme Court has described vividly the intimate relation between the power of the State to remove encumbrances from tax-delinquent lands and the welfare of the public. Baker v. State Land Office Board, 294 Mich. 587, 592-594. Land speculation ran riot in Michigan in the 1920's, bringing with it construction of subdivisions, paving and drainage projects, etc. Inflated land values produced their inevitable consequences. In the early 1930's a large part of Michigan lands had a market value far less than the unpaid property and improvement taxes accumulated upon them. Attempting to remedy the situtión, the legislature tried tax collection moratoriums, and for six years no tax sales were held, but still unpaid taxes continued to amass. Property owners abandoned their heavily encumbered real estate; the state and local governments could get no revenue from the delinquent property; and municipal creditors could get neither principal nor interest. All suffered alike. Finally in 1937, upon the recommendation of legislative committees and planning commissions, Acts 114 and 155, *supra*, Note 1, together with Act 325, were passed by the legislature in an attempt to collect unpaid taxes and to free property of its accumulated tax burden.

mit drain districts to bargain away the State's power to sell tax-delinquent lands free of encumbrances. Long before the date when appellants' bonds were issued, the Michigan Supreme Court had held that, "The general rule is that a sale and a conveyance (by the State) in due form for taxes extinguishes all prior liens, whether for taxes or otherwise. This rule is one of necessity, growing out of the imperative nature of the demand of the government for its revenues," *Auditor General* v. *Clifford*, 143 Mich. 626, 630; and see *Municipal Investors Ass'n* v. *City of Birmingham*, 298 Mich. 314, 325-326, and cases there cited. The provision of the drain statute upon which appellants rest their case does not expressly purport to alter this "rule of necessity." On its face it deals only with the levy of an additional assessment in the event that drain bonds are not paid in full at maturity, and does not assume to deal with the manner of selling tax-delinquent properties in drain districts or the kind of title that can be conveyed at such sales. "The language falls far short of subjecting lots which have been sold to pay tax or assessment liens to an additional assessment for the deficit. Such a construction would defeat the remedy of tax sales as a means of realizing the assessment lien." *Municipal Investors* v. *Birmingham*, 316 U. S. 153, 159.

Affirmed.

Mr. Justice ROBERTS concurs in the result.

Mr. Justice MURPHY took no part in the consideration or decision of this case.